



*S<sup>r</sup> John Nisbet of Dirleton, Lord Advocate,  
One of the Senators of the Colledge of Justice,  
And one of his Ma<sup>ties</sup> most Hon<sup>ble</sup> Privy Council etc.*





*S<sup>r</sup> John Nisbet of Dirleton Lord Advocate,  
One of the Senators of the Colledge of Justice.  
And one of his Ma<sup>ties</sup> most Hon<sup>ble</sup> Privy Council etc.*

SOME  
Doubts & Questions,  
IN THE  
LAW;  
Especially of  
SCOTLAND.  
AS ALSO, SOME  
DECISIONS  
OF THE  
LORDS  
OF  
COUNCIL and SESSION.

---

COLLECTED & OBSERVED  
By Sir JOHN NISBET of Dirleton, Advocate  
to King CHARLES II.

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To which is Added,  
An INDEX, For finding the Principal Matters in the said *Decisions*.

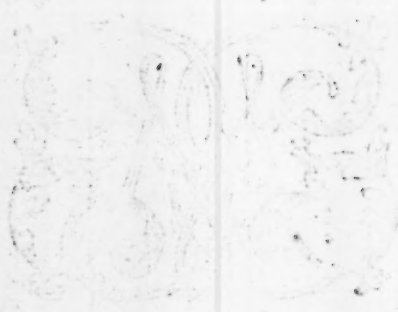
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# ADVERTISEMENT,

TO THE

## R E A D E R.

**T**H E Deceast Sir **J O H N**  
**N I S B E T** of *Dirleton*,  
His Abilities in the *L A W S*,  
and generally in all *Learning*, pro-  
cured him the Employment of  
*Kings Advocate*, And one of the  
*Lords of Session*, and other Honour-  
able Places deservedly conferred  
upon him, in the time of His late  
Majesty King **C H A R L E S** the  
Second.

His long Practice and profound  
Knowledge, in Our *Laws*, gave the  
Rise to the following *Doubts* and  
*Questions*; Which, if he had Lived,  
he would have Answered and Clear-  
ed; as he has done many of them, to  
the great satisfaction of our Ablest  
*Lawyers*,

\* \*

ADVER (12) EMENT  
*Lawyers*, and great improvement of  
our Law.

The *Decisions* are, What his Lei-  
sure, from publick Office, could al-  
low him to Observe, and were ever  
thought so Succinct and Judicious,  
that most *Lawyers* were at Pains, to  
cause Copy them from the com-  
mon *Manuscripts*, though neither  
full nor Correct; which now in the  
Printing is carefully helped.

At *Edinburgh*, the fifteenth day of *July* 1697. Years.

**T**HE Lords of His Majesties Privy Council, Do hereby Grant  
to George Mosman, Stationer Burges of *Edinburgh*, his  
Heirs or Assignes, The sole Priviledge of Printing and Selling  
a Book, Entituled, Some Doubts and Questions of the Law,  
Especially of *Scotland*; As also, The Decisions of the Lords  
of Session, Observed by Sir *John Nisbet* of *Dirleton*, Advocate to His  
Majesty King *CHARLES* the Second: Together with, An Index to  
the saids Decisions: And discharges all other Persons whatsoever, to Re-print,  
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Sellers, or Importers of the said Book to the said George Mosman.

Extracted by Me

GILB. ELIOT Cls. Sti. Conf.

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Page 2. lin. 16. after posterior add first. p. 10. l. 21. given read got. p. 16. l. penult. dele or. p. 19. l. 11. place the comma after only. p. 23. l. 8. right r. burden. p. 25. l. 3. was r. is. Ibid. dele and. p. 26. l. 13. after Dispon-mer add a me & de me. p. 61. l. 22. r. in compeno. p. 82. l. 11. of Kin r. Heir of Tailzie. p. 83. l. 12. after unles add, Tailzied. p. 84. l. penult. Males ls. r. Males are. p. 99. l. 19. after use add of. p. 103. l. 29. r. Confirmatione. p. 114. l. 7. aditur r. auditur. Ibid. l. 41. r. pertinebat. p. 122. l. 20. nor. r. but. p. 130. l. 7. Immediate r. mediate. p. 133. l. 10. against the Price r. against the Buyer. p. 170. l. 45. r. oblectari. p. 184. l. 11. null; r. Moveable. p. 195. l. 29. second r. first. p. 198. l. 8. delemale. p. 218. l. 14. after but add If.

SOME

# SOME Doubts and Questions,

IN THE

# LAW,

Especially of

# SCOTLAND.

A.

## Adjudications.

**B**Y the Act of Parliament, upon *Comprisings* or *Adjudications* for a Sum of Money, The Superior may be forced to enter, or to pay the Debt, *Quaritur*, If he may be urged to enter, upon Adjudications proceeding upon *Dispositions*, in prejudice of the Superior, by obtruding a Vassal; feing in that case he has not *Retractum Feudalem*?

A Vassal having made a Disposition, or granted a Bond for Disponing his Lands, will the Superiour be obliged to Infest upon Adjudication? *Ratio dubitandi*. That the Superior, by the Act of Parliament, is obliged only to Infest Comprysers, or Adjudgers being Lawful Creditors, and he has *Retractum Feudalem* paying the Creditor: And the Debitor has *Retractum Legalem*, which is not in the case of Dispositions.

A

IF

If Lands should be Adjudged from the Appearand Heir of *Ward-lands*, Whether will the Appearand Heirs *Marriage* be due, and affect the saids Lands in prejudice of the Adjudgers? *Answer.* Albeit that it appears, that *Marriage* should be of the nature of *Ward*, which is not *Real* as to singular Successors; the Superior having only Right to the Duties, which he may uplift; And *ex stilo* of a *novus damus*, *Marriage* is not reckoned amongst real Incumbrances: Yet in the case of *Thornidikes*, the Lords has found *Marriage Real*.

Whether *Reversions* that are comprysed need no Intimation, In Respect of the *Series* of Solemnities that is in Comprysings, By which they become so publick, that they are presumed to be known to the Person Lyable, If there be not *Eadem Ratio* in Adjudications, being now of the nature of ordinary Decrets?

If at least there be a difference betwixt Bonds and Reversions; So that, as to Bonds, when there is a Competition of Two Comprysers, The Posterior intimating should be preferred?

If Superiors, who are *Subjects* only, will be obliged to receive Adjudgers to be their Vassals, having Adjudged not for Debt, but upon Dispositions? And if the King be in another Condition?

If, upon a Disposition, The Receiver should obtain Sentence for Damage and Interest against the Disposer his Heir for Implement, If in that case, the Adjudger ought to be received? *Ratio Dubitandi*, That *Primordium inspicendum est*; and upon the matter there was not a Debt *ab initio*?

If a *Reduction Ex capite Minoritatis*, not being inteped at the instance of the Minor, *Jus Actionis* may be Adjudged?

An Heretable Bond being Adjudged, Though there be no necessity of Intimation, because Adjudications and Comprysings are publick Rights upon Record. *Quaritur*, If the Debitor, paying *bona fide* to the person, to whom he granted the Bond, will be *in Tuto*, the said Adjudication not being intimate? *Answer.* It is thought, that he should be *in Tuto*, seing Intimations are required for Two Effects. *Viz.* Either to compleat the Right be Assignment, or to certiorate the Debitor that he make payment to no other person: And though an Adjudication be sufficient, as to the said first Effect, an Intimation is necessary as to the other, unless the Debitor be called in the Adjudication.

### *Advocation by the Justices.*

IF the Justices may Advocate to themselves Criminal Processes, depending before Lords of Regality, or other Judges? It is thought, The Lords of Justiciary cannot Advocate: The taking or Advocating Processes, from a Competent Judicatory, upon Reasons of Advocation, being a Power and Prerogative belonging to his Majestie's Supreme Judicatories of Session and Council. And Reasons of Advocation, either upon Suspicion, or some other Reason meerly Civil or of State, belong not to the Cognisance of the Justices, but to the Lords of Session and Council. If they were to Advocate, the Reasons of Advocation behooved to be first discuss'd; and what could be the method, since all Processes

cesses before the Justices are so peremptory, That Caution must be found both by the Pursuer and Defender.

### *Alimenta.*

**C**onstituto semel Alimento, quo nihil in jure magis favorabile, aut magis personale, de eo nec Alienatio nec Transactio ritè celebratur; datur enim ut persona exhibeatur & utcumque vitam toleret; Mirum igitur Advocatos primi ordinis tanto conatu & boatu summa ope annisos, ut Judicibus persuaderent aut imponerent, asserentes Alimentum, uxori constitutum juri Mariti obnoxium esse, vel saltem creditoribus Mariti esse integrum illud afficere; Quod enim offibus hæret nec a persona cui competit avelli aut alienari potest, illud nec juris Ministerio, aut fitione transfertur; Quum igitur Alimentum adeo personale sit (ut superius diximus) ut alienari nequit, ita ut ab uxore nubendo in Maritum non possit transferri tacitâ & quasi alienatione: Sublato autem jure Mariti, jus Creditorum quod subit in consequentiam & ut accessorium corripit, nec subsistit magis quam accidens sine subjecto. Broomhall contra Darfie, Julii 7. 1678.

### *Altarage.*

**S**ome Lands being Founded, by a Burges of Dumfermling, to an Altar in the Church of Dumfermling, for Maintainance of a Chaplain at Saint Marys Altar there; And it being provided by the Foundation, that the Founder and his Heirs Male should Present the Chaplain; The said Lands being after Fewed, and since Disposed *Quaritur*, How shall the purchaser be Infeft? This case is not under the Act of Parliament anent Laick Patronages; The case there being of Patronages, whereof there is Infeftment holden of the King, whereas the Patronage in Question, is not by Infeftment, but provision as said is: *It is thought*, that the Chaplain is Superiour: And if there be none, a Chaplain should be presented. *Caribber. Quaritur*, The Patronage being to the Heirs Male of the Founder, and if they do not present within Days, The Dean of Gild of that Town should present, Whether the Heir-Male may Dispose the Patronage? *Ratio dubitandi*. The Provision in the Foundation, is not in favours of Assigneys, and the Founder had confidence only in his Heirs; And such an Interest being Religious, and provided to a Family, with the said substitution, is not *in commercio*. *Randisford*.

### *Annexation to a Barony in another Shire.*

**W**hat is the effect and import of Annexation of Lands, lying within one Shire, to a Barony lying within another? Whether it be Annexation only, that one Seisin may be sufficient, for all the Lands, though in several Shires: Or that Inhibitions, and other Diligence should be used at the Mercat-cross, where the Barony lyeth?

### *Annualrent.*

**A**N whole Barony of Land, being affected with an Annualrent, and being thereafter Disposed in several parcels to diverse persons; If one of the saids Purchasers should be distressed, for the whole Annualrent,  
May



May he have recourse against the others, for their proportional parts, they being *in rem correi debendi*?

A Person being Infeft in an Annualrent irredeemably, so that neither the Heretor may Redeem, nor the Annualrenter may require his Money, and the Annualrenter not being Creditor, but upon the matter *Emptor annui redditus*, *Queritur*, Whether such Annualrents will be lyable to subsequent Laws, restricting and lessening Annualrents? *Ratio dubitandi*, These Laws do militate only in the case of *Mutuum*, which is not here; There being neither *Sors*, nor *Usura*, nor *Debitum*, as to the principal Sum; And though such Annualrents be constitute with a respect to the Sum that was payed, and the Annualrents thereof current for the time, That does not alter the case; seing the property of Lands is only bought with the like consideration, And the Annualrents of Money might have been heightened, and the Annualrenter wants the benefite competent to him in the case of *mutuum*, *viz.* In the case of Money lent out for Annualrent, he might uplift the Sum, and employ it more profitably than for a small Annualrent.

An Annualrent being Disponed to be uplifted out of Lands and Teinds, and Infeftment following thereupon, *Queritur*, What will be the Effect of the said Right as to the Teind, seing the Ground cannot be Pounded for the same; these not being *Fundus*? *Answer*, The Right of the Teinds may be apprysed, and a personal Action will be competent against the Heritor of the Teinds, during his occupation.

An Annualrent being disponsed, to be by Infeftment out of several Lands lying *discontigue*; *Queritur*, If the Disponer may unite the same, so that one Infeftment, taken at one of the Lands, may be sufficient for the others?

### *Annualrent for Damage.*

*Quer.* IF the Defender should be lyable for Annualrent of the price, in so far as it is more, nor the Worth of the Lands? *It is thought* Not, because the Rate is not certain, and the Defender may get a Buyer at the same price; And that the Defender was *in bona fide* to contract with a Pupil so authorized, and if he have prejudice, he should have recourse against his Tutors Representatives; And Annualrent is not due for Damage and Interest until it be declared. *Tweeddale contra Drumelzier, vide Reduction upon Minority litera M.*

### *Right of Annualrent.*

A Person having disponsed Lands, with a Procuratory of Resignation and Infeftment to the Buyer of the Lands, and for security to himself of a part of the Price for an Infeftment of Annualrent redeemable upon payment of the Sum, and with a Clause likeways that the Infeftment shall expire. *Queritur*, 1. If there be prejudice to the Buyer, that his Right should be so affected, being his Ground-right? *Answer*, It is thought there is none; Seing upon payment, if the Party desire, There may be a Renunciation, upon the back of both Charter and Seafin, relating to another of the same Date, to the effect it may be regiltrate. 2. *Queritur*, If the said Right, being to be holden of the Superior, may be

be extinguished without Resignation? *Answer.* It, being only a redeemable Right, after Redemption, in strictness of Form, cannot be resigned, because it is lousd. And formerly, in Wadsets of Property, the Superior, upon the Redemption, did grant Precepts; and a Right of Annualrent cannot be resigned for a new Infeiment given to the Heretors Superior, that being inconsistent with the Property in one Person; And therefore, a Decreet of Redemption, with the Clause foresaid Resolutive in case of Redemption, relating to both, doth sufficiently extinguish it. And if there should be a Resignation in the Superiors hands, it should not be *in favorem*, for the Reason foresaid, or *ad Remanentiam*; But to the effect the Annualrent might be renounced, and consolidate with the Property, with the Superiors consent.

### Relict's Annuity.

**W**hen a Husband is obliged, and his Heirs, to pay an *Annuity* to his Wife in Liferent; If other Creditors be about to do Diligence and Comprise after his Death, *Queritur* If the Relict may not pursue the Heir to secure her, and for that effect to grant Infeiment of Annualrent, and upon a Decreet Adjudge an Annualrent upon that Ground? *Quando aliquid conceditur aut disponitur, concedantur omnia sine quibus non potest explicari.* And the Obligement for the Annuity will be otherways Void.

### Annus Utilis.

**A**nnus utilis Duplex est, 1. *Ratione initii, ut initium sit utile, & postmodum Dies continui.* 2. *Ratione omnium dierum, ut actor habeat potestatem agendi, reus respondendi, & Dies sint judiciales.* Thes. Befold. in Lit. I. 51. vid. Injuria.

### Appellatio.

**A**ppellatio non permittitur in foro Saxonie; sed in ejus locum successit *Leuteratio*, ad eum finem introducta, coram eodem Judice, ut gravamina errore forte litigantium, vel negligentia Judicis illata, brevi manu reparentur, sed hujus rei abusus perspicuus est. Vide *Leuteratio*, Befold. Thes. Litera. l. 53.

### Appellatio a Camera Imperiali.

**A** pud Germanos, cum sit ultimum Judicium Camera, ab ea non appellatur ne tamen sua potestate abutatur, constitutum est judicium Revisorium, ad quod ij qui per iniquitatem aut negligentiam Assessorum lasos se existimarent, provocare & Revisionem petere possent: per Commissarios Imperatoris, & Statuum Imperii, ad id deputatos, adversus sententiam sine dolo, non tamen sine errore, aut culpa latam. *Fritschii Exercitat. juris publici, pars. 2. exercit. 1. n. 88. & sequen.*

*Revisio habet effectum Executionis suspensivum, 91. Ibid.*

*Judicium Camerale cum non a solo Imperatore, sed a Statibus suam acciperit autoritatem, tum Imperatoem, tum Status representat, Ibid. n. 83.*

*Camera Praesidem & Assessores initio constituebat Imperator, sed Ordinibus,*

consentientibus, id deinceps mutatum, ut Assessores ab Ordinibus presentarentur Ibidem.

Imperator causas in Camera captas, advocare non potest; quia per modum Contractus in ordinationem Camera consensit, & ideo ad ejus observantiam de jure tenetur, Ibid. n. 84.

## De Appellatione a Praefecto Praetorio, & aliorum Judicum Sententis.

**L**icet ab iis ob eorum Excellentiam non liceat provocare, iis tamen qui Laesos se affirmant supplicandi Licentia permittitur, & remedium datur per Supplicationem ex gratia, non per viam Restitutionis ex Justitia, praesertim cum sententia lata est contra Jus Litigatoris. Thes. Besoldi. p. 557. litera L.

## Appellatio a Vicario.

**A** Vicario ad eum cujus est Vicarius, non appellatur, cum utriusque idem sit Tribunal. L. Romana 3. de appellationibus sexto Decret. L. 1. & 2. Cod. De Officio ejus, cujus vice alter judicat. Sigismund: Scaccia de Appellationibus. q. 8. n. 61.

## Approbatio.

1mo. **N**ulla Exceptio aut allegatio in foro magis trita aut frequentior est illa de Approbatione; Aut (ut loquimur) de Homologatione, quae illa regulâ niti videtur, quod approbo non reprobo: Sed cum omnis definitio in jure sit periculosa, & ista ut omnis materia Braccardica variis substringatur limitationibus; aut enim Approbatio juris alicujus celebratur expressâ ratificatione & id agitur ut approbetur, & ex casu reprobare quod approbavit nulli licet, nec honestum est: aut aliud agitur sed ex actu colligitur & inferitur approbatio, & eo casu dispiciendum quid actum, & actus agentium ultra eorum mentem & intentionem haud operantur. V. G. Eius prædium, ratus illud ad venditorem pertinere ut optimum maximum, nec Servituti aut Reversioni (ut loquimur) seu Retractui obnoxium; emerit adversarius Sempronius asserens servitutem aut jus prædii Retinendi sibi competere; ejus vel potentiam veritus, vel alia ratione impulsus, cum eo transiit, isto jure vel mihi cesso vel acceptilato, sed Titius idem jus servitutis aut Retractus ab eodem authore adeptus, sed potius quia antea: Si ex eo contra me ageret, mihi contra jus Retractus aut servitutis excipienti haud obtrudi posset me jus homologasse & approbasse; eo quod sessionem, aut acceptilationem ejus stipulatus fui, ea enim transactione id tantum agebatur, ut litis ansâ præcisâ, conditio mea melior non deterior foret; & ut mihi consulam acquirendo jus, si quod erat penes Sempronium, non vero ut jus aliquod a me alienem.

2do. Eadem ratione, si juris mei ignarus prædium meum conduxì, aut post locationem Dominium ejus nactus, & domini forte haeres sum; in possessorio, locatore de mercede agente, de jure meo exceptio haud admittenda est, nemo enim sibi causam possessionis mutare potest: nec minus possessione reddita jus meum integrum & illibatum superest, nec in petitorio, aut declaratorio obest conductio, aut exceptio; Quod approbo non reprobo; conducendo siquidem prædium quod ignarus meum esse, alienum rebar & locantis, id mihi erat propositi, ut jus in eo consequar, non ut jus in alium transferam: & consensui, sine quo nec est, nec esse potest alienatio, nil magis contrarium quam error.

Arrest-



## Arrestment.

**I**F Arrestment be *Pignus Prætorium*, and doth so affect, that in whatsoever hands the thing arrested cometh, it will be lyable thereto? Or if it be only a *Diligence*, and upon the matter of the nature of *Inhibition in mobilibus*, so that the Debtor dying, or the subject that is arrested being Pounded or Comprysed, the Arrestment will be ineffectual?

If the Goods in the Hands of the Debtor, upon Arrestment, may *habili modo* be craved to be forthcoming? Or if *habilis modus* of all Goods (but Money) be to POUND or Apprise: the Propriety of *Corpora* being only transmitted *per Traditionem*?

If Arrestment upon a registrare Bond may be lousd being before the Term of Payment?

Whether, where there is nothing due by a Person in whose hands Arrestment is made the time of the Arrestment, the same will affect a supervenient Debt?

If Arrestment die with the Debtor, or doth affect after his Decease?

If a Bond for lousing Arrestment be void through the Debtors Decease?

If at least an Arrestment upon a Decreet, be of an other nature than that upon a Dependence, being in effect *Pignus Prætorium*, and Execution *pro tanto*; or if it should be at the most, like a *Denunciation*, whereupon Comprising has not followed in the Defuncts time, which therefore is void?

Albeit an Arrestment doth not import a Right of *Hypothec*, and that notwithstanding, an other Creditor may poud. *Quæritur*, If at least, it should have that Effect, That the Person in whose hands the Arrestment is made, cannot pay the Debtor in prejudice of the Arrester: and that as he cannot pay the Debtor, so after his decease he cannot pay his Heir nor Executor, being *eadem Persona*?

Executors being in Competition upon Arrestment to make forthcoming, Whether they should come in all *pari passu*, notwithstanding some be before, and some after; as in the Case of Comprisings being both at one time, though the Denunciation be at several times?

*Quæritur*, If an Arrestment doth affect Debts due by the Person in whose hands the Arrestment is made contracted after the Arrestment? *Ratio Dubitandi*, Inhibition doth affect Lands acquired thereafter; and Arrestment, as to such things as are the Subject of Arrestment, is of the nature of Inhibitions, and there is *eadem ratio* as to the Interest of the Creditor.

Arrestment being made of a Sum, due by a moveable Bond, bearing Annualrent, and of all profits due to the Debtor by the said Bond. *Quæritur*, Whether the said Arrestment should be effectual, not only for the Annualrents already run, but these that should accrue thereafter? The same Question may be as to duties of Lands. *Ratio Dubitandi*, *Quod non est, aut nullum est, nullum sortitur effectum*. And Arrestment of what is not yet extant, is *accidens sine subjecto*. It is thought, That there is a difference betwixt a Debt, that is not neither in *spe*, nor *obligatione*; and conditional Debts, which though the Condition be not existing, may be arrested; and the Condition existing, the Arrestment will be effectual: and a  
for-



*fortiori*, Annualrents, and Mails, and Duties, may be affected by Arrestment, seing, from the date of the Obligation, *dies cedit*, though *non venit*.

If a Debitor be in Possession of a *Coal*, or of a *Miln* in his own hand, what course can be taken by a Creditor, at whose Instance there is a Dependence, to secure the Profits, in case he prevail?

What is the Reason of Difference betwixt *Arrestment* and *Inhibition*, as to that Point, seing Arrestment affects only what belongs to the Debitor for the time? *Answer*, The Arrestment relates to Goods and Debts, the time of the Arrestment; and Inhibition is simply, that the Debitor should not dispoñe his Lands and Estate; and Arrestments are a Diligence against the Party who is Debitor, or has any Goods in his Hands belonging to the Arresters Debitor himself.

### *Arrestment of Conditional Debts.*

**I**F a Creditor should arrest a Sum due to his Debitor upon a Wadset, in case of Redemption; What will the Import be of such an Arrestment? *Answer*. If redemption follow, and after the Order another Creditor arrest; *It is thought*, That the Arrestment before will be preferable; as in the case of the Arrestment of a conditional Debt, which will be drawn back, *Existente conditione*, vide *Wadset Quæst: 1ma. Litera W.*

### *Arrestment Loufed.*

**Q**UÆRITUR, If upon a Dependence, or Bond unregistrate, there be Arrestment laid on, and the same be loufed; and thereafter, the Goods arrested be poidned, The Cautioner for loufing the Arrestment will be lyable? *Ratio Dubitandi* is, That the Goods were not fraudfully put away by the Debitor. *Quæritur*, If after the Arrestment, the Debitor contract Debts, and the Goods be poidned for the said Debt, contracted after the loufing the Arrestment, *Quid Juris*, Will the Cautioner be lyable?

### *Per Aversionem.*

*A*Versione emere, aut locare dicimur, cum universaliter & uno pretio vendimus aut locamus: Duobus enim modis locatio fit, vel per Aversionem vel ut in pedes, vel mensuras, merces præstetur. Theſ. Bes. verbo Buſchſtauff. 127.

## B.

### *Back-bonds to the Exchequer.*

**T**HE Exchequer having granted Gifts: *v. g.* of Recognition, or others, but upon *Back-bonds* in favours of Creditors, and of the Wife and Children; So that they have reserved no Interest to the King, but to themselves only to regulate and arbitrate the dispenſing the Benefite of the Back-bond, in favours of Creditors and the Wife and Children; May they proceed, and apply that Benefite, in favours of such

as apply to them, without calling the other Parties? *It is thought*, That the Lords of Exchequer are to be considered as *Arbitri*, and that their *Arbitrium* is *regulatum*, and should not be used, without citing of all these, who have any Interest; that upon full hearing of all Parties, they may proceed.

### Bairns Part.

**I**F a Son get a Portion in order to live upon it *seorsum*, and out of his Fathers Family. *Queritur*. If he can be thought a *Bairn*, and claim a Bairns-part, seeing he has not granted a Discharge, nor accepted the same in Satisfaction. *James Cheisly*.

There being Three Heirs of diverse Marriages, and certain Provisions in favours of the Heirs of the Marriage, being made in the respective Contracts of Marriage. *Queritur*. If (there being no other Bairns in *familia*) they will have their *Bairns-part*, notwithstanding they are Heirs? And if they have, *Queritur*. If they must *confer* their Provisions, if they be unequal? *Answer*. They will come in as Bairns. And as to the second *Quærie*, *It is thought*, they should not *confer*; seeing they have their Provisions, not simply as Heirs, but as Children, by the said Provisions.

### Bond Heretable.

**I**F a Bond bearing an Entail of a Sum. *Viz.* To the Creditor and the Heirs of his Body, which Failzieing to a Brother, or Heir of a Brother, who would not succeed either him or his Children; be Heretable, in Respect of the Entail, though Executors be not excluded, neither doth it bear a Clause of Infeftment?

A Band being granted to a Husband, and his Wife the longest Liver of them Two, and the Heirs of the Marriage, which Failzieing, to the Husbands Heirs and Assignees whatsoever. *Queritur*. Whether the said Bond belongs to the Heirs or Executors of the Husband. *Ratio Dubitandi*, It is granted since the Act of Parliament 1641. And the Act of Parliament 1661. and the Act of Parliament 1641, are positive, that all Bands for Sums of Money bearing Annualrent are Moveable, Except in the two cases therein exprest, *viz.* Of an obligation to Infeft, Or of a Clause Excluding Executors. And on the other part, the said Acts seem only to intend Bonds containing payment of Annualrent for profit, which upon that account before the said Act were Heretable after the Term: Whereas the Bond in Question is not only Heretable upon the account foresaid of payment of Annualrent; But because the same is expressly Tailzied, and provided in favours of Heirs, and in the first place of Heirs of Provision of the Marriage: And the Sum is of purpose Heretably fixed for a Liferent to the Wife and a right of succession to the Bairns of the Marriage, so that the Husband cannot Test of it; And it cannot fall under Executory *ab intestato*, in prejudice of the said Tailzie: And is of the same Nature, as if a Bond were taken to a Man and his Heirs Male, which would not be Moveable, seeing it implies the Clause excluding Executors.

When a Bond is taken to the Creditor, and Failzieing of him by De-

cease to another person, bearing only Annualrent and no Heretable Clause, *Queritur*; If the Creditor to whom it is granted may Dispose of it by Testament? *Ratio Dubitandi*, it seems not to be Heretable by the Act of Parliament: On the other part the said Substitution imports the Executors to be excluded, and a Testator cannot dispose by Testament of what *ab intestato* could not fall to Executors: And though the Creditor be Fiar and may dispose of the said Sum, yet he cannot do it on Death-bed; the same being an Heretable Sum.

If at least after the Death of the Creditor the said Sum be Heretable in the Person of the Substitute? *Ratio Dubitandi*, The same is Moveable by Act of Parliament; And the Substitute having now right to it, he is in the same case as if the Bond were granted to him: *Ex adverso*, the same being *semel* Heretable is *semper* Heretable, untill it be made Moveable by a Charge.

If a Bond containing such a Substitution should be made Moveable by a Charge, would it notwithstanding belong to the Substitute?

If an Heretable Bond may be comprysed; And if the *Legal* expire will the Creditor have right to the sumes contained therein, though far exceeding his Debt?

### Bond Moveable.

A Party having given a Bond to the end that thereupon a Comprysing may be deduced against the Granter, For settling the Estate of his Father in his Person; And having granted a Back-bond to pay the person granter of the Bond a Sum of Money, with Provision That if he denude of the Comprysing he shall be free of payment of the Money. *Queritur*, If the Sum be Moveable; So that the Relict of the Creditor may crave a part thereof *Jure Relictæ*, in respect the Sum is in *Obligations*: And to denude of the Right of the Comprysing is in *Facultate Solvendi*. Mr. Archibald Nisbet contra Dalgarno.

### Bonds of Provision to Children.

A Father having granted Bonds of Provision to Children with a Clause That they should be valid though not delivered, *Queritur*, The same being granted in *Leige poustie*, If they should prejudice the Relict or Fisk? *Ratio Dubitandi*, The Granter is Master of them, and may Cancel and destroy them. *Answer*. *Si absit Dolus* and the Defunct did intend nothing but to provide his Children, they should be considered as a Debt.

### Bond of Relief.

If a Person obliged Conjunctly with another upon a Bond to be relieved may not after Registration of the Principal Bond charge for Relief: And for that effect to pay the Sum and pound for the same? *Forbes contra Udnie*,



## Baron Courts:

*Queritur* If the Superior may pursue before his Baron Court for Non-entry, or Ward, or Marriage? *Ratio Dubitandi*, That the said Casualties are *fructus* of the Superiority; And seeing the Baron may pursue his Tennents for the Fruits of Property, There is the same Reason, that he should pursue for the Fruits of his Superiority: And the Vassals have no prejudice, but rather Advantage, that they are not taken from their own Houses to answer before another Court, and to be at the Charges both of Attendance and Process, which are greater there: And if the Baillic do wrong, it may be repaired by a Reduction.

## Bastard.

**I**F a Bastard has disposed his Estate in *Leige Poustie*, and Infeftment has not followed during his Life, Will the King or his Donator be lyable to fulfil the Disposition?

If a Bastard's Relict and Bairns, will have their *Legitime*, though he cannot make a Testament? *Answer. Affirmative.*

If having Children, he may make a Testament, and name a stranger an Executor; seeing the King has not prejudice: And his Children cannot complain, having their *Legitime*? *Cogitandum.*

If at least he may leave Legacies: And his Children Executors nominate, at the least nearest of Kin, and Executors *ab intestato* will be lyable to the same?

If a Bastard has *Testamenti factionem passivam*, and may be named Executor, or Heir of Provision? *Answer. Affirmative.*

If a Bastard may have an Heir of Tailzie and Provision? *Cogitandum.*

If a Bastard, by a Deed *inter vivos* has disposed his Estate in Lands by a delivered Write: and dyeth before the Right be perfected, *Queritur*, What way the same shall be perfected? or what Action is competent to the Person in whose Favours it is made, and against whom? *Answer*, It is thought, that the King being to succeed to the Bastard, his Officers may be pursued, and the Director of the Chancery, if the Lands hold of the King (and if they hold of another Superior, the said Superior) To hear and see the samen adjudged, and Precepts directed.

*Quid Juris*, If the Deed be not a simple Disposition, but a Right to the Disposer in Liferent, and another Person in Fee; with the ordinary Clauses and Power to alter? *Answer*, There may be more Question in this case, being upon the matter *Donatio mortis causa*.

*Quæ Ratio*, That a Bastard cannot make a Testament, whether or not *ob maculam natalium*: Or that by reason thereof they were as *Dedititij* in Law, swa that during Life they were *liberi*, but dyed *servi* and *nulli*, without power to dispose of any thing? *Answer*, That the said Incapacity was *ratione natalium*: Seeing these who have no other Heirs (so that the King is to succeed as *ultimus Hæres*) have not *Testamenti factionem*.

If a Father who is a Bastard will succeed to his Children? *Answer*, It is thought, he will.

Bishops



## Bishops.

**I**F Precepts granted by Bishops may be execute after their Death?  
 If a Bishop being upon the point to be Translated, may accept a Renunciation of a Tack not expired, and grant a new Tack for moe years, in prejudice of his Successor? Or if he may set a Tack?

## Bishops Debts.

**S**Eing Bishops are an Incorporation and do not represent their Predecessor's Person, but only the Incorporation: and therefore are not lyable to his Debts; *Queritur*, If at least he be lyable to the Debts of the Bishoprick, As *v. g.* If there be an Annualrent payable out of the same to a pious Use, and the preceeding Bishop has not paid the same: Will his Successors be lyable personally, at least will their Rents, be affected by a real Action of Poinding the Ground, or like to the same?

*Quid Juris* As to the Taxation; if a Bishop would be lyable for these bygones that were due by his Predecessor: reserving Relief against his Heirs and Executors?

## Bodomaria.

**B**odomaria est Fœnus Nauticum, quo sub spe majoris licri pecunia datur Navis Patrono; hoc pacto ut salvâ nave tantum cum fenore reddatur, relicto interea Hypothecæ loco navigii fundo, quo perditio & capitale interit. Befold. Thesaurus, Bodom.

## Burgh's Liferent Escheat.

**W**Hat Execution can be against Burghs for their Debt? If they may be charged with Horning, and if thereupon any Liferent Escheat may follow?

## C.

## Camera Imperialis.

**C**ameræ sententiæ, an ab iis appelletur; an Imperator eas advocare possit? de earum revisione, vide A. & ibi Appellat.

## Captions.

**I**F Captions may be Execute after Sun-set, seing Poinding cannot be then executed? It appears there is difference betwixt Poinding and Caption, by reason other Persons that may have interest in the Goods may be concerned in the Poinding, which is not in Captions: And the Kings

Kings Rebels may be taken at any time, and there is no time so fit to take and surprize them as the night. *Rothemay* against *Forbes*. Before, the Council found that Captions should not be execute in the night.

### Casualties of Superiority.

**I**N General It is thought that all Casualties, which are *Fructus Domini directi*, are to be considered as *fructus pendentes* of Lands, which pertain to the singular Successor; unless they be *Collecti*: and they are never thought to be *Collecti*, unless they be at least claimed and pursued for.

### Causa cum qua Res transit.

*Res transit cum sua causa, hoc est cum omni cominade, & onere Jus. Fluv. p. 775. n. 55.*

In conditionali dominio interest, an sub conditione ad nos pertineat, an vero à nobis abscedat, priori casu quamvis Dominium in terra sit non potest, tamen quoad nos est in pendenti & in spe tantum: altero, si actum nostrum sed existens re conditione resolvitur: Nam meum est quod certa lege regitur est, Jus Fluviae. p. 790. n. 145. & deinceps.

### Cautioner and Relief.

**I**F a Cautioner be Denounced for his Cautionry, will the Principal be lyable to relieve him of the loss of his Escheat? *Ratio Dupitandi*. The Principal is obliged to relieve him of what he should pay for him, but not of the prejudice he should sustain for his Contumacy and Rebellion, through his not payment.

### Chaplainrie.

**I**Ands being holden of a Chaplain, a Bishop being Patron, if there be not a Chaplain and the Bishop delay or refuse to present, what course shall be taken by the Vassals Heir, or singular Successor to get Infeftment? If the Bishop may not be pursued, and the Director of the Chancery, to hear and see him decreed to present a Chaplain, and to exhibite to one of the Clerks of Session the Presentation to be registrar, to the effect it may be known and patent to the Leidges, and that within days after he be charged: And in case of disobedience, verified by a Horning against him upon the Decreet; The Director of the Chancery to direct Precepts for infefting of the Vassal.

Seing by Act of Parliament anent the Superiority of Chaplainries, and such like, The Patron to the Chaplain is appointed to be Superior to the Chaplains Vassals. *Queritur*, If Chaplains hold of the Bishops, the Bishop will be Superior? *Answer*, It is thought not; seing the said Act of Parliament is only in favours of Laick Patrons, and was made when the Bishops were suppressed.

*Charge to enter Heir.*

**A**N appearand Heir being charged to enter Heir in General, and renouncing, *Quaritur*, If there may be a Comprising or Adjudication against him, unless he be charged to enter Heir in Special? *Ratio Dubitandi*, That *frustra* should he be charged to enter Heir having already renounced: Yet *it is thought* he ought to be charged, seing a special Charge to enter Heir, is *Instar* and in place of a Special Service, and Intestment thereupon: and the Heir may repent that he renounced, and may be better advised, when he is charged to enter Heir in Special.

*Chattels Real.*

**I**f Herots, Non-entries, Ward, and such like Casualties, that are successive when they are gifted, they become real Chattels, and will fall to the Executors of the Donator, as is thought; *Quaritur*, If when they are not gifted they should be considered also as Chattels, so as to belong to the Executors of the Superior, and not to his Heirs and Successors of the Land? *Cogitandum*.

*Children and Creditors.*

**I**F a Father grant Bonds to his Children, and thereafter contract Debt, so that he is not in a condition to satisfy both his Creditors and Children, Whether the granting of Bonds for Onerous Causes will import a Revocation of the Childrens Provision: At least will the *posterior* Creditors be privileged and preferable to the Children?

*Childrens Provisions.*

**A** Father having disposed to his Son of the first Marriage, the Fee of his Estate; with power to burden it with 40000 *merks* for provision of his remanent Children allanerly. *Quaritur*, If he being then married upon a Woman of that age, that he could not have Children by her, should thereafter marry; May he provide any part of that Sum to the Children he had thereafter of the last Marriage? Or if the remanent Children, in whose favours the Faculty is reserved, can only be understood of the remanent Children of the first Marriage, he having then five besides the Heir, *Mr. Alexander Gibson contra his Brother*.

*Civitas.*

*Civitates & Municipia intelliguntur nomine Reipublica: & eis competit beneficium Legis. leg. 3. cod. de Jure Reipub. Sc. Rempubicam ut pupillam extra ordinem jvari. Frischius Tom. 2. exercit. juris publici, exercit. 2. n. 17. & sequen.*

*Præscriptio non currit minori sed Civitati, Ibid. 35.*

*Propter tenuitatem civitas novum vectigal imponit, Ibid. 37.*

*Gaudet Præscriptione centum annorum.*

*Ex solo pacto sine traditione, quibusdam casibus habet in rem actionem Ibid.*

*Usus-fructus ei relictus durat centum annis Ibid.*



*Clauses in Contracts of Marriage.*

**T**He Contract of Marriage betwixt *Alexander Sandilands*, and *Agnes Sandilands* his Wife Daughter to *Robert Sandilands* Dean of Gild, beareth that provision, *Viz.* That the said *Robert* and his foresaids are obliged to the said *Agnes* and her Spouse that at *Robert* his Decease the said *Agnes* his Daughter shall be esteemed a Bairn of the House and Family; And shall succeed to her Part and Portion Natural equally with the remanent of *Robert*'s Bairns to all Sums, Plenishing Goods and Gear, and others that should pertain to the said *Robert* the time of his Decease.

The said *Alexander* is obliged and his foresaids, that whatever Benefite shall fall to the said *Agnes*, or her to succeed to by her Father's Decease, or by vertue of the said Obligement, to provide the same after he should get it, to himself and her in Conjunct-fee and Liferent, and to the Bairns betwixt them, which Failzieing his Heirs and Assignes, 9 January 1657. Registrate 1 March 1671.

The said *Alexander* is obliged to provide the Conquest to himself in Liferent; and their Bairns in Fee.

The Contract of Marriage betwixt *John Hamilton* Writer and *Rachel Sandilands* the other Daughter of the said *Robert*, Bears, That they accept the Tocher in satisfaction of all other Sums, Executory, Debts, Goods, and Gear, and others whatsoever which was provided to the said *Rachel*, or which may fall or pertain to her, or may be claimed by her by Decease of the said *Robert*, or her Mother *Mause Weir*. All which she and her Husband Assignes to the said *Robert*, his Heirs, Executors, or Assignes to be Disposed at their pleasure.

By the Clause of Conquest the said *John* is obliged to provide the same to himself in Liferent, and the Bairns in Fee: And to that effect to insert the Bairns Names in the Writes.

The said *Rachel*, if her Husband Decease before her, is to have (if there be no Children) the half; and (if there be) the third of the plenishing of the House the time of his Decease, which is to be made free of Debts by his Heirs and Executors.

*Queritur*, If the Obligement to succeed to all that should pertain to the Father should be understood, only as to a Bairns Part, and should not be extended to the Deads-part?

If what should fall to *Agnes* after her Father's Decease, should belong to the Bairns of the Marriage, though the Marriage be dissolved through the Husbands Decease before the Father *Robert* his Decease?

If *Rachel* the other Daughter notwithstanding her Renunciation, will come in as one of the nearest of Kin, at least as to Deads Part, *Viz.* Deads third and the half of a Bairns Part.

By Contract of Marriage, the Husband is obliged in the first place to provide 30000 *Merks*, to his Wife in Liferent, and the Heirs of the Marriage presently: And to the other Bairns 18000 *Merks* after his Decease.

*Queritur*, The Heir being served, will there be a Confusion as to his Debt and Provision? *2do.* If he may have Action against the Executors for it, as Heir and Creditor? *3tio.* If he succeed to his Father in Land-Estate, though the Money was not employed, will not the Obligement be



be satisfied, *pro tanto*? 4to. Will the Bairns come in *pari passu* or must the Heir be satisfied in the first place out of the Moveable Estate?

### Coals.

**A** Woman being Infeft in Lands in Liferent; *cum Carbonibus & Carbonariis. Queritur*, If she may win Coal where there was none before in order to Selling? *Ratio Dubitandi*. That *usus fructus est jus utendi salva rei substantia*, and the Coal *usu consumitur*; And being digged *non renascitur*: It is thought therefore, that where there was no Coal before, The Liferenter cannot break Ground in order to Selling.

*Queritur*, If the Liferenters at least may Win Coal, where there was no going Coal before in order to their own use and for their Fire, Refounding any Damage that may be by breaking of the Ground. *Cogitandum*.

Where there is a Coal going, *Queritur*, If the Liferenter may continue to Work and Sell? *Answer*. It is thought for the Reason foresaid the Liferenter cannot Sell, but may claim by the said Clause to have as much Coal as may serve for the Liferenters use only, unless it be expressly provided that the Liferenter may Win and Sell as the Fiar might have done.

If the Liferent be not constitute so clearly in the Terms foresaid, and it be only provided that the Liferenter shall Liferent the going Coal, *Queritur*, If the Liferenter may have the same benefite of the Coal as the Fiar might have had, both for the Liferenters use and for Selling, providing that the Liferenter use the same as *bonus Vir*, and in the same manner as was in use formerly, and do not any thing of purpose to the prejudice of the Fiar: putting in too many Colliers or otherwise?

As there is *quasi Usus-fructus* of Money, if it ought to be so of Coal, and what is Win should be valued, and the price should be valued to the Liferenter in Liferent and in Fee to the Heretor? To consider if this case has occurred elsewhere in the case of *Sylvae ceduae*.

### Collation.

**B**Y Contract of Marriage, the Husband is obliged to provide the Heirs of the Marriage therein specified; But there is a Clause subjoined, That if there be only Daughters, and they be more than one; The Eldest only should succeed, and the other Daughters should resign their parts in her favours, reserving to the Father to provide them which he did not: There being beside some Heretable Estate, *Queritur*, If the Eldest will not only have the Land, but her share of the other Estate as Heir Portioner? *Ratio Dubitandi*. That Law and Nature favours and intends Equality, betwixt Children; Especially where the interest and preservation of Families is not to be considered, and upon that account there is no Prerogative of Primogeniture and *agnationis* which is only competent *Liberis Masculis*, Daughters being *finis & caput familiae*: And by the Contract the Eldest Daughter is not obliged to Marry one of the Name or who should take the Name. 2do. The Heir cannot be Executor unless he confer, or upon the foresaid consideration, and there appears to be *Eadem Ratio* in this case, *Whitelaw*.

If an Heir, to the Effect he may share in the Executory offering to confer the Moveable Heirship, ought not also to confer Lands, and other Heretable Estate? For the Executory may be very considerable, and it were hard that upon Collation of the Moveable Heirship possibly of small value, he should both retain the Heretable Estate how great soever, and share in the Executory though very great.

If there be Three Daughters, and the Eldest at her Marriage get a part of the Lands. *Queritur*, If she will share as Heir Portioner with the other Sisters, unless she confer; as in *England*.

### *Commission not to Expire morte Mandatoris.*

**I**F a Commission may be granted by a Person to Freinds for Selling Lands and to endure irrevocable, not only during his own Lifetime; but after his Decease to bind his Heirs untill it be Execute? *Ratio Dubitandi*, *Mandatum expirat morte*: And on the other part, there may be a necessity to Sell, and his Heirs may be Minors: Or upon some other considerations it may be fit that there should be such a Power given; And as he may bind himself by granting such a Commission, he may bind his Heirs being *eadem Persona*.

### *Commissioners to the Parliament.*

**Q**ueritur, If there be any case wherein Commissioners to the Parliament ought to consult the Shires whom they Represent? *Answer*. It is thought, that albeit by their Election they have Commission *cum Libera potestate*, It is to be understood that they may *superstruere*; But cannot evert or alter Fundamentals and the constitution of the Government either of Church or State: And if any thing of that nature be intended, it ought not to be done by Representatives, unless they have special Authority to that purpose.

### *Commonities.*

**T**He Servitude of Pasture being either in common Muires, as *Glads-muire* or such like; Or in Commonities belonging to Heretors and Superiors, and their Vassals by Rights from them; Or in Lands belonging to others and not to their Superiors. *Queritur*. If an Infestment *cum communi Pastura* will be a Ground of Prescription, in all the foresaid cases, unless it be special as to the Subject, and the Lands to be Pastured upon? *Answer*. As to common Muires, if the Lands adjoining be Disposed, *cum communi Pastura*, by the King, it is to be presumed that before they be Disposed, the Kings Tennents of the Lands Disposed were in use to Pasture in the said Muire: And therefore the Clause *cum communi Pastura* is to be understood with the Pasture formerly belonging to the King; And in that case, possession though not for the space of Fourty Years by vertue of that Right is sufficient. *2do*. There is the same reason as to Lands Disposed by Superiours having a Commonity within their own Property. *v. g.* in *Dirletoun*, unless there be some speciality. *v. g.* as in *David Forrest* his Precept of *Clave constat*, there is Nine Acres given without mention of Pasture in the Commonity of *Dirletoun*, and there is, a Te-

nement and three Acres and an half *cum communi Pastura in Communia de Dirlctoun*; So that the Right being granted *unico contextu*, the Right of the said Acre *cum communi Pastura* Excludes the same as to the other Nine Acres. 310. As to a Commonty within the Property of other Superiours, the Clause *cum communi Pastura* in the *Tenendas* will not be a ground of Prescription, unless there be a Right or Constitution by the Heretor, within whose Property the said Commonty is.

### Common Appendant.

**Q**uæritur, There being a Servitude of Pasturage or Commonty due to me out of Neighbouring Lands (which the *English* call *Common Appendant*) will the Servitude extinguish if I purchase the saids Lands, *scilicet res sua nemini servit*? *Answer*. It is thought that it is Suspended but not extinct: So that if the Purchaser sell the Lands affected with the Servitude it will revive, unless it be provided otherwise: And Servitudes of that nature are Real, and pertinents *Prædiorum non Personarum*.

### Communio.

**C**ommunis Possessio, quæ vel ad pascendum, vel ad alios fructus participandos vicini utuntur, non caret Litigiis; Divitibus proportionem Geometricam, pauperibus Arithmeticam affectantibus: Sed possessio Geometrica servari debet & Prælati, ita ut qui majores habet possessiones magis utantur pascuis, qui minoris minus. Jus Fluviat. p. 561. n. 25.

### Compensation.

**I**F there may be Compensation on a Bond prescribed, For that reason, *Viz.* That *qua sunt temporalia ad agendum* they are *perpetua ad excipiendum*; And the ground of Prescription as to Personal Actions being *Negligentia petentis*, cannot be pretended in this case, the Defender being satisfied in his own hands.

When in Processes for Sums of Money, Compensation is proponed, and the Pursuer Replies upon Recompenation, and the Defender again Duplies upon Recompenation. *Quæritur*, what course shall be taken by the Judge upon their several Recompenations? *Answer*, If it appear that the Pursuer or Charger is addebted in as much to the Defender, as the Defender to him, all the Compensations being considered, the Defender ought to be assoiled; and the Parties *hinc inde* should be decerned to give up and discharge the Grounds of the Compensation: And if all the Compensations being sustained, the Defender be found debtor to the Pursuer, a Decreet should be given for what is due: And if the Pursuer be found debtor to the Defender, the Defender ought to be assoiled, and the Pursuer decerned to pay what he is owing.

An Assigney to a Debt for an Onerous Cause, having pursued for the same, *Quæritur*, If it be alledged that, the time of the Assignment, the Cedent was the Defenders debtor, and that he hath present Action for liquidating his Debt; Whether ought Compensation to be sustained upon the



the said Ground, and a time granted to liquidate? *It is thought*, That the Cedent not being Inhibere, nor any Diligence done against him, the Sum assigned was in *Commercio*, and might be disposed of by him; there being then no ground of Compensation, which is *de liquido in liquidum*; and otherwise *non tollit obligationem. vide Retention, in Litera R.*

### Composition for Entry.

**I**F the Superiority be disposed or comprised after Resignation, *Queritur*, Whether what is payable for receiving of the Vassal should belong to the former Superior: Or to his Successor by whom he is to be received, being *pretium* of his Entry.

### Compriser.

**I**F after expiring of a Comprising, the Compriser may pursue for the Evidents, being incidents to the Right.

### Comprising.

**I**F a Bond for an Onerous Cause, being granted by a Person not Inhibited, and publick Infestment thereupon, be preferable to a Compriser who had comprised before, but was Infest after the Bond?

If a Compriser of Ward-Lands die before the expiring of the Legal, Will the Marriage of his Heir fall?

If it fall, Will the Debitor, if he redeem, be lyable to resound the Avail?

Comprisings of Heretable Bonds, though they be upon the matter Legal Assignations, so that the first Compriser will be preferred to the second intimating, in respect of the previous publick Solemnity in deduceing Comprisings: Yet Intimation is necessary to put the Debtors in the Bonds comprised *in mala fide*.

If there be a necessity of a Declarator of expiring a Legal, as there is of a Conventional? Seing in many Cases there may be much Equity for purging the expiring; as if the Sum be all paid but a very little part, and the Lands exceed much the Debt.

If the Compriser come to be Debitor in a Sum equivalent, Will the Comprising expire?

The first Comprising being reduced at the instance of a posterior Compriser *ex capite Inhibitionis*, Will the first Compriser have Right to the Legal of the second?

Though the Debitor be Inhibited, May he not assign the Legal?

If Comprising whereupon Infestment is not to follow, and which formerly needed not to be allowed ought to be Recorded, conform to the Act of Parliament 1661. *Act.* ?

There being a Comprising against a Principal and two Cautioners of their respective Lands; and the Right of the said Comprising being acquired by a Person who had bought one of the Cautioners Lands, If that Person should dispoise the Right of the other Lands with the Comprising, Sums, and Grounds thereof, as to the said other Lands, only before the



the expiring of the Legal. *Queritur*, 1. If he hath not reserved expressly the Compriseing and Sums thereof as to his own Lands, but has only disposed in the Terms foresaid: Will the Compriseing extinguish as to his own Lands, seing it could not subsist without the Grounds, and these are disposed? *Answer*, *It is thought*, It will not extinguish, in respect the Compriseing is not simply disposed, but only as to the other Lands, and the same not being disposed as to his own Lands, *eo ipso* it is retained together with the Grounds; and it was *Actum* that the Disposer, by acquiring the Compriseing, should be thereby secured as to his own Lands: And having disposed the same as to the said other Lands, Law presumeth that he has retained it as to his own Lands in the first place, and that it should be effectual as to the other Lands in the second place: And *Acta agentium* are to be understood to operate according to their Intention.

*Queritur* 2do. If the Compriser of that Legal should Redeem, who should have right to the Sums; whether the Disposer, or these to whom he has disposed, as to the other Lands, at least to a part of the same?

*Answer*, If the Disposers Interest as to the Security of his Lands amounts to, or exceeds the Sums, he will have Right thereto entirely, seing he is to be secured in the first place.

If a Compriser Infeft in Lands doth consent only to a Right made by the Debitor of a part of the Lands comprised, will that Consent secure the Buyer against the singular Successors of the Compriser, having Right from him by Compriseing or Disposition and Infeftment thereupon: Seing they may pretend that a Consent doth not denude *habili modo*.

A Creditor comprised the Principal Debtors Lands, and some time thereafter the Cautioners Estate; and after the Compriseing against the Principal was expired (But yet the Compriseing against the Cautioners was running) he disposed of some of the Principals Lands. *Queritur*, If the Cautioner may plead that the Compriseing against him is extinct, In swa far as the Creditor has an irredeemable Right to the Principal's Estate, Exceeding his Debt: and is satisfied at least may be satisfied with his Intromission and disposing of the same?

A Compyrser, after expiring of his Compyrseing of his Debtors Estate exceeding the value of his Debt, Intrometting with or disposing of a part of the same. *Queritur*, If he may Compyrse any other Estate belonging to the Debitor: Upon pretence that he is not satisfied: Or if the Expiring of the Compyrseing and the making use thereof thereafter, putteth him in the same condition as if the Lands had been Disposed to him irredeemably, and *datæ* and accepted *in solutionem*: So that both Principal and Cautioner, against whom a Compyrseing is yet running, may pretend that the Debt is satisfied; At the least that the Creditor should denude himself of that Compyrseing *cum omni causa*? *Lamertoun contra Mr. John Fairholme*.

A Compyrser of Lands holden Ward being Infeft. *Queritur*. If these Lands will ward by the Decease of the Compyrser; And if the Marriage of the Appearend Heir will fall? *Ratio Dubitandi*, A Compyrser is but an *interim* Vassal for security of his Debt: And upon that Consideration such a Right in England is considered as a *Chattel*.

If the Compyrseing be redeemed will the Debitor be Lyable to refund the Damage sustained by the Ward and Marriage?

*Queritur*

*Quæritur*, If the Ward of the Compyfers Heir, will determine and expire upon the Redemption?

*Quid Juris* in that case of proper Wadsets, if the Debitor after Redemption will be Lyable to Refound the foresaid Damage? The difference being that a Compyring is an involuntar Right, and the Wadset Voluntar, so that the Creditor seemeth to take his hazard.

If Lands be Compyrsed from a Person who has no Right thereto for the time but acquires thereafter a Right, whether the said *jus superveniens* will accresce?

If there be a difference betwixt a Compyrser and a Buyer from an interposed Person, who has acquired a fraudulent Right, *Viz.* That a Buyer acquires a Right for an Onerous Cause, and it is just and the Interest of Commerce that he should not be prejudged, whereas a Compyrser does only Diligence upon his own hazard, and the Right *Transit cum sua causa & labe?*

A Right being acquired *bonâ fide*, from a Person not Inhibited, after Compyring, and being Infeft before the Compyrser. *Quæritur*, Whether he or the Compyrser will be preferable? *Answer.* The Lords found in the case of Sir Patrick Nisbet and Hamilton, That the Compyrser should be preferred: Which appears to be hard, seing, a Compyring is only *jus ad rem* and a Legal Disposition; And the first compleat Right by Infeftment seems to be preferable, and a Compyring does not import *viti-um*. *Litigiosi* seing the Debtors Right is without Question: And the Question is whether the Compyrser or the Receiver of the Disposition should have Right to that which is unquestionable in it self?

The Debitor or these who have Right to the Legal, Redeeming from the Appearend Heir of the Compyrser, whether doth the Redemption sist the course of the Ward and Marriage if the Heir be not Fourteen Years of Age? *Answer. Affirmative. quia resolutio jure principali resolvuntur consequentia.*

Will not the Debitor be lyable not only to pay the Debt but to refound the prejudice the Creditors Heir sustains upon occasion of the falling of the Casualty of Ward and Marriage by the Decease of the Debitor? *Answer. Affirmative*, and the Creditor and his Heirs should be *Indemnes*: It being the Debtors fault that they are forced to Compyrse, and that the Compyring is not Redeemed.

Whether a Discharge does extinguish a Compyring, the Creditor granting to be satisfied; In the same manner that Intromission within the Years of the Legal doth extinguish the same? *Answer.* If there be no Infeftment a Discharge is sufficient: But if there be Infeftment, there must be at least a Renunciation Registrate in the Register of Reversions.

A Compyring being Redeemed, whether doth the Debtors Right and Infeftment revive, or must there be a new Seafin, and what way shall the Debitor be Released? *Answer.* There must be a new Seafin; and the same way is to be taken as in the case of a Regrefs: Seing the Compyrser as he has a Legal Reversion, so there is a Legal Regrefs.

*Quæritur.* If a Compyring as to all effects be equivalent to a Resignation? *Ratio Dubitandi*, That a Compyring is not only a Legal Disposition but the Compyrser may be immediatly Infeft upon the same, as upon a Resignation, though the Debitor decease.

If a Compyrser get a Right to the Legal of his own Compyring before

fore it expire by another Apprying; And so *Deinceps* if there be more Compyrings whereof the first Appryser obtains Right within the Respective Legals. *Quæritur*, when the same doe expire? *Cogitandum*.

If a Royal Burgh, or others having Power to receive Vassals upon Resignation, has Power likewise to receive upon Compyrings: And if in that case any Composition be due to them?

If the Lands be Compyrised how shall the Duties be divided? *Answer*. If any part of the Lands be sown before the Compyring, the Encrease will belong to the Compyrser: And if the Lands be set, the time of the Compyring is to be considered; For if the Compyring be before *Whitsunday* the Compyrser will have Right to the whole Duties; And if it be before *Martinmas*, he will have Right to the half: And if after *Martinmas* to no part thereof.

The Superior being charged with Horning to receive a Compyrser, and being Denounced, will he be Lyable for Damage and Interest: if either he Infest a second Compyrser, or a Precept be direct out of the Chancery for Infesting him?

If upon the Redemption of a Compyring, the Superiors will be obliged to Infest the Redeemer *Gratis*?

*Quid Juris*, If the Redeemer be another Creditor?

*Quæritur*, If Compyrings be equivalent to Dispositions and Resignation following upon the same, so that the first Compyrser is preferable to others even before Infestment? *Answer*. That Compyrings are only Legal Dispositions, and do not denude the Debitor without Infestment, whereas Resignation being made in the Superiours hands and accepted doth denude.

What is the reason then that after Compyring, it is found that the Debitor not inhibited cannot Dispose in prejudice of the Compyrser? *Answer*. That the Law, and the Judge who is *Lex animata*, having in *subsidium* Disposed to the Creditor the Debtors Lands; the same is so affected by the Legal Diligence, that the Debitor is denuded as to that effect that he can do no voluntar deed to prejudice the Creditor; Without prejudice nevertheless of more exact and compleat Diligence of other Creditors, who obtaining Infestment will be preferred to the first Compyrser: as in the case of Moveables after Arrestment, the Debitor cannot dispose the same, and yet may be Evicted by another Creditor by way of Pounding.

If a Superiour be content to take a Right to a Compyring of Lands holden of him, not being willing to enter the Compyrser. *Quæritur*, If he may claim a Years Duty when the Lands are Redeemed? *Answer*. *Negative*: And he is in the same case as if he had Compyrised himself, so that as he cannot in that case neither in the other can he claim any Composition; in respect the samen is granted only that the Superior should not be prejudged by obtruding a Vassal, upon him against his will.

If by the *First Act of Parliament* anent Compyrings, a Composition was due to the King? *Answer*. It is thought, not: There being a difference betwixt the King and other Superiours; in respect the King is *Pater Patriæ* and all the Leidges being his Subjects, it cannot be said that he has any prejudice by the change of his Vassal, and long after the said Act of Parliament Signatures were not past upon Compyrings, but Compyrings lay at the Signet and were the warrand of Charters under the Great Seal.



To try when that Custom was changed, and what warrand was for changing the same.

A Person having Compyred Lands and having granted Bond that he being satisfied of the Sums due to himself, and of the Sums due to another person, and that other person being relieved of his Cautionry for the Debtor, The Compyrer should denude himself in favours of the Debtor: And the said Compyrer having thereafter Disposed the Right of the Compyring, but with the Right of the said Backbond expressly provided in the Disposition and the Procuratory of Resignation therein. *Quæritur*, If there be no mention in the Seafin that the Right is with the said Burden, whether the Compyrer will be still Lyable by the said Backbond to the Persons in whose favours it is conceived? And *2do*. If the said Backbond will militate against a singular Successour acquiring a Right from the Assigney to the Compyring. *Answer*. It is thought both the Compyrer and the person having Right from him with the Burden of the Backbond will be Lyable. *2do*. A singular Successor will not be Lyable unless the said Provision, that the Right should be with the burden of the Backbond, be in *Traditione* and in the Seafin.

*Quæritur*, What way shall the Appearand Heir have the Right of the Lands Compyred where the Compyring is extinguished by Intromission, If it be not by a Service as Heir to his Father? *Answer*. He may give in a Bill to the Lords or intent Action against the Superiour on that ground, That the Lands are in effect redeemed and satisfied by Intromission; And that the Superiour and the Creditor being convened, it ought to be declared that the Lands are Redeemed, and the Creditor ought to renounce, and the Superior be decerned to Infeft.

When a Person is denuded by Infeftment, and yet the Infeftment and Disposition whereupon it proceeds is Reduceible upon the Act of Parliament as being in *Fraudem Creditoris*. *Quæritur*, What course the Creditor shall take, and whether he should first reduce before he Compyse? *Ratio Dubitandi*. That if he compyse the Debtor being divested as said is, there is nothing in his person to be comprised. *Answer*. It is thought it is fitter to Reduce and then to Compyse; Because after the Creditor has been at the Charges of Compyring, it may be there may be difficulty in the Reduction; And yet upon other Considerations, it may be fitter first to Comprise; in Respect the Lands may be Compyred both for the Debt of the Disposer and the Debt of the Person to whom the Right is given.

### *Infeftments upon Compyring.*

**W**Hen there is a Clause in a Charter upon Compyring, That if the Compyring expire another Infeftment should be taken within Year and Day, otherways the Infeftment to be void. *Quæritur*, What is the effect of that Provision, if it may be purged? *2do*. If another Compyrer may object the said Nullity?

### *Conditio.*

**C**onditio est adjectio, quâ id quod dari, aut fieri volumus, confertur in aliquem casum & suspendit obligationem.

Con-



*Conditione impossibili adjecta, Contractus est nullius momenti, & contrahentes Ludere videntur, secus in sponsalibus & ultimis voluntatibus in quibus favore Matrimonii & ultimæ voluntatis, tales conditiones habentur pro non scriptis. Christen. de Sponsalibus quæst. 14.*

### Confession by Criminals.

**I**F a Confession be emitted and signed before the Judge in the Criminal Court may the Pannal Retract and not adhere to it before the Assyse, so that the Inquest cannot proceed on it as an evidence and clear Probation?

Minors having confessed hainous Crimes, may they desire to be reponed upon pretence of their Age, though they do not pretend and clear that their Confession was upon Error or Mistake?

### Confirmation.

**A** Feu of Church-Lands being neither confirmed by the Pope nor King, If the Confirmation by the King of Rights granted thereafter by the Feuer to be holden of the King; will supply the want of Confirmation of the Original Charter?

When a Person is Infeft to be holden of the Superior and deceaseth, and both the Disponer and Superior that was for the time are deceased, yet the Superiority is conveyed to a singular Successor, *Quæritur*, If after long time the singular Successor in the Right of the Superiority may confirm the said Infeftment: So that the Heir of the Person Infeft, though not confirmed in his own time, may be Infeft as Heir to him by a publick Infeftment? *Ratio Dubitandi*, It cannot be said that his Father was Infeft by a publick Infeftment: To consider therefore whether the Party infeft being infeft to be holden of the Superior, may be said to be truly infeft holden of the Superior; But that the Infeftment was not a compleat Right, until the Superiors Consent and Confirmation was had, whereby it did convalesce, as if it had been from the beginning: Or if there be no mid impediment? And there is a Difference betwixt *Visiosum ab initio, & Incompletum*; *illud nunquam confirmatur, istud accedente complemento convalescit.*

Whether or not Confirmation may be granted after the Death of the Disponer? *Vide Craig.*

If a Disposition be granted to be holden of the Superior containing a Precept of Seasin, and if it be confirmed by the Superior, but before Seasin follow thereupon the Superior is denuded of his Right in favours of his singular Successor, *Quæritur*, If thereafter Seasin may be taken on the said Precept? *Ratio Dubitandi*, That *Res devenit in alium casum*, and the former Vassal not being denuded, he remains still Vassal to the succeeding Superior; So that by no deed without his consent, a new Vassal can be obruded to him.

*Quæritur*, If Infeftments being to be holden of a Superior, may be confirmed after the death of the Person infeft? *Ratio Dubitandi*, *Craig* seemeth not to be clear, upon that Ground that the Superior and Vassal should both consent; So that the consent of the Vassal in taking the Infeftment and the Superiors in confirming the same be conjoined, which cannot be, the

the death of either interveening: It is thought nevertheless, that such Rights may be confirmed after the Death of the Receiver, though their Consents cannot be conjoined, which was only done, and when the consent of Persons is required *ad integrandam Personam*; as in the case of Pupils and Minors, it ought to be given before their decease, & *in ipso actu*; But where the consent and confirmation of Persons is *ad integrandum & constituendum Jus*, which is constitute and perfected *per gradus & partes*, The consent and confirmation may be at any time *re integrâ*, and where there is no *medium impedimentum*: as *Exempli Causâ*, If there be a Comprising against the Disposer, the Disposition cannot be confirmed.

Item sometimes there must be Confirmation neither *ad integrandam Personam*, nor *Constitutionem Juris*, but for confirming the Right constitute; as the Popes Confirmation in the Right of Church-Lands, or the Patron's Confirmation; which are necessary in regard of their Interests, *Et ne quid Detrimenti Ecclesia capiat*: which may be at any time.

If a Right be confirmed after the Death of the Receiver of the Right, and after the Disposers Heir is Infeft upon the Retour, *Quæritur*, If the Heir of the Person who receives the Right, may be served Heir to his Predecessor as having dyed last vest and seased, notwithstanding that the Right was null the time of his decease; and that there is *medium impedimentum* in the Retour, by the Infeftment of the Disposers Heir? *Answer*, It is thought he may be served Heir, and the said Infeftment is not an impediment; the Heirs of the Disposer being *eadem persona* and in effect his Author: And the said Infeftment is in effect to the use and behoof of the Receiver of the Right and his Heirs: And the Heir of the Disposer is in no other case than the Disposer himself, whose Infeftment is to the use of the Buyer until his Right be confirmed, and then ceases.

If the King should confirm the Charter *à me* granted by *Castlemaines* to *Cesnock*. *Quæritur*, If in that case the Vassals will be in any hazard? *Answer*, It is thought, not; seeing it cannot be said that they were at any time Vassals to *Cesnock*: And though *fictione Juris* the Confirmation be drawn back as if *Cesnock* had been infeft immediatly after his Right: yet it cannot be drawn back where there is *medium impedimentum*; the Vassals having acquired a Right before, and having never been *Cesnock's* Vassals but only to *Castlemains* before the Forefeiture.

If an Heretor of Land dispoise his Land to be holden of the Superior, and the Superior confirm the Disposition with all that shall follow upon it; But before Seafin be taken upon the Precept, the Disposer dies. *Quæritur*, What way the Purchaser shall be Infeft? *Answer*, The Disposers Heir is to be Infeft, and to grant a Precept relating to the former Disposition and Confirmation: Or if he will not, or think not fit to be Heir; the Lands may be adjudged from him as charged to enter Heir.

*Quæritur*, In the case foresaid, if the Superior, after he has confirmed the Disposition, die before Seafin thereupon; Whether a singular Successor in the Right of Superiority may question the said Infeftment? *Ratio Dubitandi*, That there is *medium impedimentum*, viz. The Superior is changed; and the former Vassal being his Vassal the time of his Right, thereafter another Person cannot be his Vassal without his consent: *Et è contra*, the former Superior having done all that he could do to perfect the said Right; and nothing resting to compleat it but the deed of the Dis-

Poner or his Heir by giving Infeftment, the former Superior was denuded as to his Interest: So that his Successor cannot question the said Right, being perfected by the Infeftment.

If at least the Successor of the Superiority may be urged to renew the Confirmation? *Ratio Dubitandi*, The singular Successor in the Superiority, may be urged to grant Infeftment upon Resignation in the hands of his Predecessor, *Cogitandum*. But it appears there is a difference, seing by Resignation the Property is in the Superiors hands, whereas by the Confirmation, it is not: and the Vassal is not denuded before Infeftment upon the Charter confirmed, whereas he is denuded by Resignation, and by Comprising which in Law is equivalent to a Resignation accepted, seing the Superior cannot refuse to give Infeftment upon Comprisings.

If the Disponer be denuded of the Superiority, what course is to be taken against his singular Successor for renewing the Procuratory? *Answer*, Seing in the case in question, the Buyer was infeft according to the Tenor of the said Disposition, It is to be considered if the King may notwithstanding confirm the said base Right.

### *Confiscation.*

**I**F a Person being at the Horn dwell within a Regality, and have Goods or Debts within another Regality, Will these also belong to the Lord of Regality where he dwelleth, upon that pretence that *sequuntur personam*?

### *Confusione tollitur obligatio.*

**B**Y Contract of Marriage, the Husband is obliged to employ 30000 *merks* to himself and his Wife in Conjunctie, and the Heirs of the Marriage; and has obliged also his Heirs and Executors to employ at his decease 15000 *merks* to his Bairns besides the Heir, *Quaritur*, If the Heretable Estate be short of 30000 *merks*, May the Heir pursue the Executor *ad Supplementum*? *Ratio Dubitandi*, he is served Heir and *eadem Persona* with the Defunct, & *confusione tollitur obligatio*: It is thought he may, and that *Maxim* militateth, when the Heir succeedeth *in universum Jus & Patrimonium*: But in this case the Heir having right only to the immoveable Estate, there is no confusion of that Obligation which is prestable out of the Executory, to which the Heir has no right: as in the case of moveable Debts due by the Defunct to his Heir either of Line or Tailzie, there is no confusion for the reason foresaid.

*Item Quaritur*, If there be not so much in the Executory as may satisfy the Provision foresaid in favours of the Bairns, if they may have recourse against the Heir for their Provisions? *Ratio Dubitandi*, The Heir by the Contract was to be provided presently, and the Bairns at or after the Father's decease, and by and attour the Sum provided to the Heir: so that the Heir should have his Provision as *Præcipuum* and before the Bairns: *Answer*, It is thought, That the Heir being provided under the name of Heir, which is *Nomen Representationis*, as he is lyable to other Creditors, so he is lyable to the Bairns, being provided under the notion of Bairns, who do not represent.

If



If the said Provisions had been in a second Contract of Marriage, the Son of the first Marriage being Heir of Line, would be lyable to the Son of the second Marriage though served Heir, and there would be no confusion for the Reason foresaid.

### Conjunct-Fiar.

*Quaritur*, If a Lady Conjunct-Fiar or Liferenter of a Barony may receive Vassals singular Successors upon Resignation or Confirmation or give *Novo damus*.

### Conquest.

A Father being obliged to provide to the Heirs of the first Marriage the Conquest, and having acquired a Room during the first Marriage, and disposed the same to the Son of the third Marriage, *Quaritur*, If the Heir of the first Marriage may reduce that Right, as given without an onerous Cause in his prejudice, being a Creditor by that Clause of his Mothers Contract of Marriage? *Ratio Dubitandi*, It is pretended not to be free Conquest, the Father having contracted Debt thereafter above the Sum of that Room: Whereunto it was Answered, That the said Room was Conquest, the price being then paid; and the Debt contracted thereafter.

A Merchant being obliged to provide the Conquest during the Marriage to himself and Wife, and the Bairns of the Marriage, *Quaritur* 1. Whether Conquest being *Universitas*, will fall under the Executory of the Bairns, though the subject, and what will fall under the Conquest be moveable?

2do. The Conquest being provided so, that the Right should be taken to the Husband and Wife and Bairns of the Marriage, whilk Failzieing the half to the Husbands Heirs and the half to the Wifes Heirs: Whether the Husband be Fiar and the Bairns only Heirs of provision, though the subject be Moveable?

Though the Husband be Fiar, if he can Dispose the Conquest without an Onerous Cause: or provide the same to other Heirs, in prejudice of Bairns being Creditors by such Provisions?

The Husband being obliged in these terms to provide the Conquest, *viz. Lands Heretages and Annualrents and other things*; And to take the Rights in manner foresaid. *Quaritur*, If the General *other things* be comprehensive of Moveables, there being no mention of Sums of Money or Moveables? And it seems that Conquest is to be understood properly of Heretable Interests, of which only, and not of Moveables, Rights are taken: And *other things* may be understood of things Homogeneous, and of the same nature that the things expressed in particular are of; (*Viz. Heretable*) as Reversions, Tacks, &c.

If at least Bonds bearing Annualrent though Moveable, will fall under the conquest; Seing Rights are in use to be taken thereof: And by the Law they belonged to Heirs before the statute? This and the Four preceeding Questions are in the case of *Andrew Bruce*, and his Conquest during the first Marriage.

The



The ordinary Clause of conquest in favours of Wives being of *Lands, Heretages, Annualrents*. *Quæritur*, If Bonds being Heretable because Executors are Excluded will fall under the same? *Answer*. It is thought, not; Because the Subject is only Lands, Heretages and Annualrents; whereupon there is or may be Infeftment: And Heretages comprehends only Lands, Teinds, and fuch Rights as are real by Infeftment or otherwise, or whereupon Infeftment may follow.

### Consensus.

**U**SU receptum est, ut in terrarum aut nominum & jurium alienationibus & Cessionibus, præter contrahentes alii interveniant pro interesse & consensum accomodent & subscribant contractibus & instrumentis: Sed quisnam Consensus effectus esse debeat ambigitur; quibusdam videtur, consentientes, contractus quibus consenserant haud reprobare nedum ut rescindantur agere posse, juxta tritam juris regulam quod approbo non reprobo. Alii opinantur cum nihil juris disponant aut tribuant, consensum haud extendi ultra id quod actum aut cogitatum, viz. Ut si quod jus eo tempore quo consensum adhibuerant suberat, aut juris umbra, ejus ratione aut prætextu Litem aut questionem intentare nequeant; Salvâ tamen libertate commercii, & jura si quæ sunt penes alios quam contrahentes, potiora acquirendi, aut in ea succedendi: Iis ex intervallo & post factò adeptis consensum haud obesse.

Cogitandum an ea sit commoda distinctio, consentientes si in alia jura postea succedant iis uti posse; quæ enim consentientibus tunc temporis haud competebant sed postea nec opinantibus forte jus detulit, ea antequam penes eos forent consensu a se abdicasse nec verisimile nec credere par est: Qui autem juri in alium transferendo consensit, si ejusdem rei jus & melius penes alium esse compererit & sponte & operâ suâ acquirat, ex eo adversus eos qui ipso consentiente jus alterum quasi erant agere haud audiendus: Nec enim juri nec bonis moribus consentaneum est, quod approbavit, aliquid moliri aut querere quo illud posset reprobare aut rescindere *Broomhall contra Lady Darfie.*

### Consensus Domini.

**C**onsensus assumit naturam actus super quo interponitur: Sicut stipulatio, quæ est stricti juris interposita contractui bonæ fidei. *Bef. Thef. liter. L. p. 552.*

Dominus consentiendo, non præsumitur juri suo velle præjudicare; sed solum obstaculum, quod scilicet jus vassalli sine Domini Consensu alienari non poterat, removisse: Et remissio juris sui non præsumitur, nisi verbis apertis de eâ constet. *Ibidem P. sequen.*

Regula, quod Domini consensus juri ipsius nihil officiat, procedit tantum in illis juribus; quæ Domino consentienti competentia, separatam habent rationem a negotio cui consensus accedit, non autem in his quæ ad robur & firmitatem actus pertinent. *Idem. p. 554.*

### Consent.

**Q**Uæritur, If an Apperand Heir consent to a Disposition, made in *Leffo*, after the Decease of the Granter, may another Heir quarrel the

the Deed upon pretence that the Consenter was not served Heir at any time? *Ratio Dubitandi*: The Consent of the Apppearand Heir the time of the granting the Right, doth so validate the Right, that all Heirs are precluded from questioning it: And there appears to be the same reason when the Consent is supervenient.

If the Consent will import *Behaving*?

A Person being Inseft in an Annualrent to be holden of the Disposer; and in possession by payment of the Annualrent, Consents to a Disposition of the Lands. *Queritur*, If that Consent will prejudice a singular Succesor; The Disposition being neither Registrate in the Register of Reversions, nor the Seasin upon the Disposition relating to the Consent?

If the Consent of a Person having Right by Disposition whereupon Resignation has followed, will prejudice a singular Succesor?

In what cases Consent to a Right will prejudice singular Successors? *Answer*. It is thought that where there is no Inseftment and the Consenters Right may be transmitted by Assignment or Discharged, such a Consent may prejudice singular Successors: And will amount to an Assignment or Discharge.

If a Consent of a Party having only Right to a Reversion, will prejudice a singular Succesor unless it were Registrate?

*Anent Consistories; Whereby the Usefulness and Necessity of these Courts is evinced, and Doubts and Prejudices against them, are Cleared.*

THE Question, whether a Judicatory be useful and necessary, and therefore to be Instituted, If it be not; and continued if it be already erected; or unuseful and therefore to be suppressed; Cannot be defined well *à priori*, but from the nature of the Subject, and Causes which are agitate in the Judicatory: And if the Subject be necessary and favourable, Notwithstanding any extrinsical Abuses (which may creep in to the best Judicatories) it may plead for a Reformation, but not a total Suppression.

All Causes are of necessity to be decided, and Justice is always favourable, But in some Causes (as the Law speaks) *prædominatur favor & publicum interesse*, and such, and only such are the Subject of the Jurisdiction of the Commissarys, as *Causæ Matrimoniales & Testamentaria*, which are in themselves favourable; and the Causes of Orphans and Widows, of miserable Persons, of Persons slandered and defamed, of Ministers and their Readers for their Stipends, in which the Condition of Parties pleadeth for favour, not in the point of Decision (which should be impartial, and abstract from all respects) but in the way of Procedure, that it be both exact and summar; that those Parties be neither dwanged by a long and expensive attendance, nor wronged by a precipitant handling of their Business: which Qualities seeming incompatible in a Judicial Procedure, concur only when a particular Judicatory, is allotted for such Causes: and neither the throng of their Business can juttle them out, neither the Judge can have a pretext for shifting them.

The Gravity and Difficulty of Matrimonial and Testamentary Causes is

so notour, and the favourable Elogies of Law anent these Persons, recommending thereby a Circumspect, and as it were a Religious Handling of them, are so obvious and frequent, that they need not be repeated; and it is certain that there is no Subject debated either in the Law it self, or in the large Volumns of the Doctors, with greater Prolixity and Subtility, than the Causes of Marriages and Testaments. (A.)

(A) Authent. de nupt. Novel. 24. in præfat. verba sunt eximia, alia omnia quæ sancita sunt, non omnibus competunt hominibus, nec rebus nec temporibus, studium vero nuptiarum totius est humanæ foliis: ex quo etiam renovatur solo: & ampliori quam alia dignum est sollicitudine: & humano generi immortalitatem artificiosè videtur introducere. *It is remarkable, that the whole ff. being divided in parts, one whole part, viz. the 5th. containing 3 books, teacheth de materia testamenti. Videri possunt tit. top. de testam. and the subsequent tit. to the end. decret. l. 3. tit. 11. de testam. l. 3. decretal tit. 26 de test. success. lib. 42 per totum. Clarus de testam. §. testam. Covar. de testam. genere tom. 1. per totum ff. de sponsalibus lib. 27. sequen. tit. ad fin. lib. C. de nuptiis lib. 3. & seq. tit. ad 27. 4. decretal. desponsalibus & matrimonii per totum decret. causa 27. lib. 32. Inclusive. Covar. in 4. lib. decretal.*

It is to be observed from Law and History, that from these Reasons, Matrimonial Causes, and *publicatio & insinuatio Testamentorum* (which is with us the Confirmation of Testaments) were neither entrusted to the lowest sort of Judges, neither to Judges of great Employment about the decision of other Civil Actions, to be decided in a tumultuary Way, and promiscuously with other Causes, but by a considerate Choice of Judges, singled out, for these Causes: It was provided that neither the meanness of the Judge, nor the greatness, nor multitude of his other Employments, should prejudice Causes of so great Gravity and Importance. (B.)

(B) Censores, alibi magistratum omnium maximæ reverentiæ & potestatis, penes quos erat regimen disciplinæ communis; And yet it was incumbent to them, Remp. tueri, & non judicare de controversiis privatis competent to be judged by the Centumviri, arbitri cognoscebant tamen de sponsalitiis, de Repudiis & divortii, & matrimonio spreto & male tractato, Greg. Tholos. lib. 47. C. 16. de Censoris potestate, Cujac. lib. 11 ad lib. 39. Solutio matrimonii. And with what Solemnities Testaments were confirmed, appears by the Title of the ff. and the Cod. de aperiendis testamentis, and L. repetita C. de Episcopis. *It is clear, that Insinuatio Testamentorum competeat tantum magistro Censui: And by the Law defensores Ecclesiarum are prohibited to meddle with the Confirmation of Testaments, as absurd so be assumed by Churchmen, quibus est se ostendere peritos disceptationum forensium, which words of the Law, insinuate the disputable Nature of Questions incident at Confirmation of Testaments; by reason whereof, Churchmen were inhibited to meddle with them, although many other Civil Causes were remitted ad Episcopalem Audientiam, in this superstitious time, The Law 18 Cod. de Testamentis, & Lex consulta divortia Ibid. are consonant to the Law Repetita, and bears the like inhibition of Churchmen, and intimation of absurdity if they should meddle. Thereafter the Confirmation of Testaments was entrusted defensoribus Civitatum, qui eligendi erant non vilissimi sed nobiliores, and have a limited Jurisdiction in Causis Pecuniariis, not unlike the Commissaries ad 50 solidos, and thereafter 300 aureos, as appears by La Jubeus C. de Epist. & authent. ibi inserta toto tit. C. de defenf. Civitatum.*

Though the favourable Nature of Consistorial Causes, and the necessity of a several and peculiar Judicatory for them, be evident for the Reasons and difficulty fore said, and from the Patern of Antiquity; It will appear more clearly from representing the Inconvenients that will follow, if Consistories be suppressed, and by answering the Objections against these Courts.

The Inconvenients are these 1. *Omnis mutatio etiam in melius est periculosa*; Especially of a Fundamental Law and Policie, which hath ever been as ancient as any monument of Law and Policy in this Country (C.) 2. Unless there be a Judicatory appointed for these Causes, it cannot be conceived how Defuncts Wills shall be observed, how Minors, Orphans, Widows, Legators and Creditors shall be secured. 3. Whereas it may be conceived (and as we hear is urged by some men, who know not the

(C) The Antiquity of the Practique of Consistories, is evident from the Titles de Testam. In quot parces dividantur bona testatoris, de testibus & executoribus testamentariis, and diverse others of the Majesty, which were published in the time of K. David 1, about 500 Years since.

nature



nature of Testaments, nor use of Consistories) that a General Register may be kept of Testaments, as of Sales, and Mortgages, without necessity of Confirmation: The keeping of such a Register cannot supply the want of Consistories, if they should be suppressed; Because albeit a Register could be kept of Testament Testaments given up by the Defunct and presented to be registered by Executors; The Registration of them cannot be urged, if the Executors be unwilling, or the nearest of Kin, who is possibly Interested by the nomination of Executors, and leaving of Legacies, to keep up the Testament, except there be a Judicatory for Confirmation of Testaments; and Edicts served, and Intromitters charged to give up Inventar; Neither can any time be limited for registration of Testaments: And the Certification of Nullity, in case of not Registrations within the time appointed, should be Injustice; because Testaments are not the Deeds of Parties concerned, *viz.* Executors and Legators, but the Wills of Defuncts, which may be unknown to those who have most Interest: and therefore the not Registration of them cannot be imputed to them, as of Sales and Mortgages which are the Deeds of the Parties themselves, and cannot be unknown to them. 4. When Defuncts have not made Testaments, it cannot be conceived (if there be not a Judicatory for Confirmation of Testaments) how the nearest of Kin should be decreed and confirmed Executors Dative, how Licences should be given, *quando dubia est hereditas*, and apparently *damnosa*, and when *hereditas est caduca*; and neither an Executor is nominate, nor the nearest of Kin craveth to be confirmed; how the Defuncts Goods should be preserved to Minors and Creditors, if the Procurator-Fiscal be not decreed, and either become comprable, or a surrogation of Parties interested: And when Testaments have been already confirmed, how shall Testaments, *ad omissa & male apprehensa & non executi* be expedite? How shall Executors Creditors be decreed? How shall the intricate Questions be decreed, and Disputes incident in the Confirmation of Testaments be decided, anent the Nullity and Falshood of Testaments, the competition of the nearest of Kin, with the Executor Nominate, of the Executor *ad omissa*, with the Executor confirmed? Of the Executor *ad non executi*, with the Executor of the Defunct? Executors anent the Prælation of Creditors, and others of that nature?

The Confirmation of Testaments, and the decision of Causes Matrimonial and Testamentary, cannot be devolved upon the Lords of Session, without great prejudice, 1. Because the Lords are already overburdened with great Business, and weighty Causes of Heretages, and great Importance; and therefore have been forced to discharge themselves of Actions possessory of Molestation, *Jam. 6. Parl. 11. Cap. 42. 1587.* Ratifying a former Act of of the saids Lords, whereby these Actions are remitted to other Judges; because the multitude of Affairs before the Lords empaches greatly the ordinary Course of Justice: And it is not possible to the Lords to try the Verity so well, (which are the Words of the Act, and Motive of making of it.) 2. The Lords have not time to hear Parties, and urge earnestly calling and dispatch of the Businesses of greatest Consequence; far less can they have time to urge Parties to confirm Testaments, and to enquire, and take course anent Defuncts Goods, *ne dissipentur* to the prejudice of Creditors and Minors; which should be done, and is incumbent

bent



bent to the Commissaries *ex officio*, albeit Parties urge not. 3. The Lords Procedure by reason of multitude of Business before them, is not peremptory; and Parties after long and expensive attendance, having prepared their Business for hearing, cannot be assured to have them called and expedite, whereas Process before the Commissars are peremptory; and Summons bear not continuations which is necessarily required in favourable Causes, concerning Minors and poor People who cannot attend; But especially in Edicts and Testaments, which cannot bide delay, least Minors Goods should perish: And are so privileged that in Vacant and feriat times, they may be, and are ordinarily expedite, without necessity of a licence. All Questions and Causes, and probation of Adultery on Impotency, the Disputs whether *frigiditas sit naturâ vel Arte, utrum ante matrimonium aut superveniens*; *Utrum maleficium sit solubile an insolubile*, and others of that Nature, cannot be agitate *verecundè*, in so publick and eminent a Judicatory, *primâ instantiâ*.

These Causes much less can be remitted to Sheriffs, and other inferior Judges. 1. By reason of the Gravity and Intricacy of them (D.) 2. The Sheriffs have either their Offices Heretable and Patrimonial, or chosen yearly by his Majesty; The first cannot have their Right of Jurisdiction enlarged to Causes of such gravity, without a new Grant and Right from his Majesty; and here how little favourable Heretable Offices are, It is constant from Law and Reason, by the *Act 44. Ja. 2. Parl. 11*. It is Ordained that no Office should be given in Fee, and Heretage; (*Skeen de verb. Sign. in Verbo Sheriffs*) Because in Jurisdiction *persona eligitur*, and both Heretable and other Sheriffs are known to be Gentlemen who understand not the Law, nor the way of Process, and are forced to delegate *pedaneos Judices*; and to depute their Friends and Servants, who have no knowledge of the Law, and being changed yearly, have no time to learn the least formality of Process; (E.) 3. Sheriffs, who in Conscience, and according to our Acts of Parliament, are lyable to answer for their Deputs, may think it hard that Causes of such weight and Difficulty, which cannot be decided but by such as understand the Civil and Canon Law, should be remitted upon their perils to be Judged by Deputs. 4. The Sheriffs Jurisdiction both Civil and Criminal, is so large, (as is represented by the learned *Skeen, de Verb. Sign. in Verbo Sheriffs*.) that it cannot be extended, without great Prejudices, to Causes and Actions of a different nature; Because Removings, Molestations, Ejections, Services, and other Actions competent to be judged by the Sheriffs, are for the most part real and possessory, and may be easily decided by the customary Law of the Country, and Acts of Parliament; Whereas Testamentary and other Consistorial Causes, are *in apicibus Juris*; and cannot be decided, but by the Civil and Canon Law, not *authoritative*, but according to the equity of the said Law, which must be known to those who are Judges in these Causes.

(D.) Praetor, etiam Patricius & inter Maximos Magistratus. Cognoscebat de Legatis; & peculiaris Praetor constitutus est qui de fideicommissis jus dicat; hoc autem testamentariorum causarum membrum perexiguum est. L. Si cui Legatum ff. de condit. & demonstr. L. 2. ff. de origine Juris § 32, & ibi Cujac.

(E.) Sheriffs should answer for their Deputs, Jam. 1. Parl. 1. C. 6. 1404. Ja. 3. Pa. 3. C. 26. 1469.

The prejudices and common Objections against Commissariots are these. 1<sup>mo</sup>. That they are Episcopal Courts. 2<sup>do</sup>. That Official Courts are suppress'd in England. 3<sup>io</sup>. Exorbitancy of Quots, and other abuses are great in these Courts.

That the first may be cleared, It is to be considered that *Jura Episcopalia* are of two sorts. 1<sup>mo</sup>. Such as are usurped by Bishops as intrinsically inherent in the pretended Office of Bishops. 2<sup>do</sup>. Such as extrinsically belong to them by the Grant of Princes or otherways; These of the former sort (as their usurped Jurisdiction over their Bretheren) are extinct with the Office. The last sort is not to be suppress'd, if they be useful and necessary: Thus the temporal Jurisdiction of Bishops was Reserved to Baillies of Regalities, conform to the Infestment to be holden of His Majesty: Thus Episcopal Patronages are not extinct, but are to be disposed upon as the Estates shall think expedient, & sic de ceteris. That the Jurisdiction of Commissaries as it is now established is of this kind. ( F ) It appears

( F ) There is an exprest Canon in decret. dist. 88. *Episcopus tuitionem Testamentorum non suscipiat*; and the gloss explains *tuitionem*. And it is clear from the of the decretal. de Testamentis cap. 13. & cap. 17. *executio Testamentorum devolvitur ad Episcopum tantum*, cum aliquid Ecclesiæ vel ad pios usus relinquatur, tunc enim secundum piissimas Leges voluntates dilatas Episcopali studio decens est adimpleri; Where the word *Secundum piissimas Leges* is considerable; and argues that they had that privilege only. by Imperial Laws which is received in the Gloss, and is cleared from the Cod. de Episcop: audient: & de Episcop: & Clericis; and from the Authen. That Matrimonial causes were competent only to be judged in Civil Judicatories.

1<sup>mo</sup>. Because it is clear from the Civil and Canon Law; That consistorial Causes *non pertinebant ad Episcopalem Audientiam* in the times of the greatest Grandeur, and in the most Superstitious Times; And that Church-men were prohibite to meddle with them, as Absurd, and most incompetent to be Judged by them, as is evinced by Citations *supra at the Letter (B.)* But these Causes were assumed by these Judicatories in the Latter Times, upon pretext that they were pious and favourable, and by the Connivance of Princes ( G ) 2<sup>do</sup>. The Jurisdiction of Commissaries as it is now

( G ) Theologi Germanicarum Ecclesiarum in articulis Smalcaldicis hanc jurisdictionem ex postliminio tantum jure exercuerunt, & quidem non adeo veteri, ut ex Cod. & Novel. jure apparet, causas scilicet Matrimoniales à Magistratu politico dijudicandas, vide Aliare damasc: p. 462. It is acknowledged by these who are most for enlarging episcopal Government. That jure municipali tantum, confirmato Ecclesiastico, ad Episcopalem Jurisdictionem pertinet Testamenta probare & insinuari facere, Beza de Repudiis & Divoritiis concludes, Jure certe suo non tantum Prophetæ sed Christiani & Religiosi principes, leges de conjugii posuerunt. Vide Aliare Damasc. cap. 6. per totum.

established, was erected by Q. Mary in time of greatest purity and Reformation, and a Commission granted by her to the Commissaries of Edinburgh. An. 1563. And is warranted by diverse Acts of Par. Viz. Ja. 6. P. 1. C. 28. 1567. (The which Year, the Lords of Session made certain Instructions for the Commissaries of Edinburgh, and other inferiour Commissaries) By another Act of his 7 Par. 1581. which is the 26 in the Catalogue of the Unprinted Acts, and containeth a Commission for confirmation of Testaments and placing of Commissaries. By an Act of his 12. Parl. 1592 the 25. of his Unprinted Acts, Entituled a Ratification of the Commissariot of Edinburgh. By the Act. 179. of his 13. Par. 1593. Ordaining Letters of Horning to be direct upon Decrets of Provosts and Baillies of Burrows as is granted upon Commissaries Precepts. 3<sup>io</sup>. It is most evident from the 6 Act of his 20 Par. 1609. That the Jurisdiction of Commissaries is a Temporal Jurisdiction, acknowledged by the Act to flow from His Majesty, as well as any other ordinar Jurisdiction, which His Majesty might have granted to any Subject as well as Bishops; And which is grant-

ed by the said Act to the Lords of Session, as His Majesties great Consistory for Reduction of Commissaries Decrees; And which before he granted to the *Earl of Argyle*, whose Heretable Right of the Commissariot of *Argyle*, is reserved by the said Act.

There is a great difference betwixt the *Official Courts of England*, and the Commissariots as they are Established in this Country, Because Commissariots being considered either *Objectivè*, In regard of the Object and Causes Consistorial; Or *formaliter ratione modi quo versantur circa Objectum*, in regard of the way of procedure in these Courts, Commissariots are Civil and Temporal Judicatories in both respects, in respect of Confirmation of Testaments and Testamentary Causes, and Matrimonial, *de impotentia Maleficio & de Natalibus*. Bastards and others of that nature are incompetent to be Judged in Sessions, Presbyteries and Assemblies (which are the true Ecclesiastical Courts) and therefore is acknowledged to be merely Civil, because Summons are direct by the Commissaries under the Signet of Office, bearing His Majesties Name and Armes, the Certification is Civil, Witnesses are Summoned under Civil and pecunial pains, and Letters are directed for compelling them to compare under the pain of Horning: The Execution of Sentences is Civil, by pointing or comprising for Liquidate Sums; Or by a Charge to fulfil what is *in facto*, upon the Commissars Precept; Or by a Charge of Horning upon the Letters; And by interposing Action of deforcement before the Commissaries or the Lords of Session. But the Officials Jurisdiction was *Episcopale*, Ecclesiastical in both the former Respects, and was continued as it had been in the Popish Church; The Bishops usurping the Jurisdiction that belonged to Sessions Presbyteries and Assemblies; and delegating to their Officials their Jurisdiction, both *Objectivè*, in Causes competent to be judged in Church Judicatories; And *Formaliter* in the way of procedure competent only to the Church. By the Canon of the *English Church* they were Judges *in causa non modo instantiarum sed Correctionis & disciplinæ*, they had a Superintendence over Ministers, to advert that they should do their Duty in their Charges; Ministers and Church-men were accusable before them, and being contumacious and not appearing might be Suspended and Excommunicate; They were Judges whether *Crimen be notorium & publicum* or not; And upon pretext that it was not publick and Scandalous, *poterant mutare penitentiam in multam pecuniariam*; They usurped Sacrilegiously the power of the Church and Ecclesiastick Censures, and by the fulminating at random Excommunications for small matters, as small Debts, Viccarrage Teinds, the Official and his Officers Fees, and for Non-compearance in their Courts: And by their easy Absolution upon small satisfaction and for Money, made Excommunication contemptible (H) For these and other Abuses intrinsical to the Judicatory it self, These Courts have been long ago cryed down on these grounds by diverse Learned and well affected Men, and lately suppress: But the instance of their ruine cannot with reason be adduced to subvert Consistories, they being altogether different and absolutely Civil in their Institution, object and way of Process, and no more Ecclesiastical than the Church Regalities, which had an Extrinsicall dependance on Bishops in the way of holding.

(H) Vide Altare Damasc. Cap. de officialibus, Calv. Instit. Lib. 4. Cap. 11. Sect. 6.



It is already cleared, That if any Abuses be in these Courts they are not essential resulting upon the nature and Constitution of the Judicatory, but accidental, which may be Reformed, without the subversion of so old and so useful a Judicatory. *2do.* If Commissaries either be not qualified or corrupt, It is wished they may be tryed, and removed, and a solid course taken for obviating the like Abuses thereafter, that places be not venal; but proposed and disposed as rewards of Vertue to able and deserving Men *3tio.* The Exorbitancy of Fees and Quotts may be Regulated, by taking course anent the presentation to these places, that honest and ingenious Men be presented, that a Competency of settled and constant Fees be allotted to encourage honest and able Men to pretend to these places, and to enable themselves for them, and that they may live creditably and honestly in them, and Quotts may be abridged, and it may be provided that small Testaments may be free of Quot; And the Quots of great Testaments may be limited, not to exceed a certain Sum, which the Estates shall think reasonable to be the highest Quot: The Quot Silver which shall be thought fit to be taken may be employed (the Commissaries being satisfied of their Fees) to pious uses.

### Consolidation.

A Person having Right by Assignment to a comprying of Lands holden of himself, whether *eo ipso* that he has the foresaid Right, will the Property consolidate with the Superiority? Seing a Comprying is equivalent to a Disposition and Resignation thereupon: And the Superior having Right by an Assignment to a Disposition whereupon there is Resignation, and to the said Resignation; *It seems* that in that case there is Consolidation: In respect the Superior upon such an Assignment in favours of a Stranger will be obliged to Infeft him: And because he cannot Infeft himself, the Law doth introduce Consolidation. *Ratio Dubitandi* is, That Consolidation is upon the matter a Seasin of the Property; And a Seasin being *facti*, cannot be without some deed of the Person, in whose favours the Consolidation is to be made, Declaring that he accepts a Right to the effect foresaid. If it be not fit in such cases, that the Superior should before a Notar and Witnesses Declare, that seing he has both a Right to the Property and Superiority in his Person, It is his will and intention that the Property should be consolidate with the Superiority; And that an Instrument upon his Declaration foresaid should be equivalent as if the Compryer had been Infeft and had resigned *ad Remanentiam*: And if such an Instrument should not be Registrate as an Instrument of Resignation *ad Remanentiam*?

When a Person Infeft in the Property of Lands, acquires and is Infeft in the Superiority. *Queritur*, If *eo ipso* there be a Consolidation of both Rights? *Item* if the Superior succeed as Heir to the Right of the Property *Queritur*, If in that case there be a Consolidation, so that *Dominium directum trahit ad se utile*? Seing the Superior could not Infeft himself, and by his purchasing of the Property he enters to the Right thereof, and so the Property is consolidate *fictione juris*, in the same manner as if he had been Infeft.

If *vice versa*, The Proprietar acquire the Superiority, If *eo casu* there be a Consolidation of both Rights? *Answer.* It is thought, not: And that *Dominium utile* cannot draw to it *directum*, without Infeftment by the Superior of the *Dominium directum*.



If a Person being Infeft by his Father upon a Right granted to him and his Heirs whatsoever to be holden of the Disposer; be thereafter Infeft as Heir to his Father in the Superiority of the said Lands, which belonged to his Father and his Heirs Male. *Queritur*. Whether there will be a Confusion and Consolidation of the Property and Superiority? *It is Answered*. During his Lifetime there will be a kind of Consolidation, seeing he cannot be Superiour to himself: But it will cease by his Death, so that the Superiority will belong to his Heirs Male, and the Property to his Heirs whatsoever.

If he intends that there should be a Consolidation, what course is to be taken to that purpose? *Answer*. If, as in the case foresaid, he was Infeft first in the Property and then in the Superiority, he must dispoſe the Property to a Confident; And the Confident being Infeft must resign *ad Remanentiam*, to the effect the Property may be consolidate with the Superiority to him and his Heirs Male and their Successors.

If a Superior should succeed in the right of the Property. *Queritur*. If there be a confusion of both Rights in his Person? *Answer*. It is thought, though they may appear to be a Consolidation during his Lifetime, they are nevertheless distinct; Seeing the right of the Superiority may be to Heirs Male, and the Property to Heirs whatsoever: And the said Heirs may succeed *Respective*.

If the said Superiour, being Infeft in the Right of the Superiority, succeed thereafter in the Right of the Property, what way shall he be Infeft therein, seeing he cannot Infeft himself? *Answer*. *It is thought* that it is not inconsistent, that the Superior may give Precept to give Seafin to an Actorney in his name and for his use.

If the said Superior intend that the Property should be consolidate with the Superiority, what way shall it be done? *Answer*. He may direct the said Precept in these Terms for Infefting him: And seeing he has both Rights in his Person and intends that the Property should be consolidate with the Superiority; The Precept may be in these Terms, to give Seafin to the effect the Property may be consolidate with the Superiority; To be holden both of his Superior in all time coming, in the same manner as if they had never been severed.

If a Precept may not be obtained *in subsidium* out of the Chancery, for Infefting the said Person in the property to be holden of himself, seeing he cannot Infeft himself? *Answer*. It is thought that a course may be taken upon a Bill to the Lords, ordaining the Director to the Chancery to direct a Precept upon the reason foresaid.

### Decreets contra Consortes.

**A** Decreet of Reduction *Ex capite interdictionis* being obtained *in foro*; and the Wife being Liferentrix craving to be reponed, because *Competent* and omitted could not be alledged against her being *sub potestate Mariti*. *Queritur*. If she prevail, may the Husband crave the benefite of her Decreet? *Ratio Dubitandi*. Upon pretence that it is found that the Decreet against him was unjust upon the matter: And it cannot be just as to her and unjust as to him.

This Question may occur in many cases; As that of two Heirs portioners

ners, one being Major and another Minor: And after the Decreet against both, The Minor being Reponed and prevailing. And of a Decreet against a principal, having proponed a Defence of payment and having succumbed in probation: And thereafter the Cautioner being pursued, and upon probation of the same Defence, being Assailed.

### *Corporations.*

*Q*uid juris as to Crafts and other Incorporations, and as to Bishops and other single Incorporations, if in any case they may oblige themselves and their successors?

### *Creditors of the Defunct.*

*I*F the Creditors of the Defunct being Minors will be preferred to the Creditors of the Heir, though they do not Diligence within three Years?

### *Persons convict of Capital Crimes.*

*A* Person being convict of a Capital Crime, and the Escheat of his Moveables therethrough falling to the King, and he being kept in prison many Years without a Remission, and dying in that condition. *Quaritur*, Whether the Rents of his Lands in the *interim* not uplifted, will belong to the King and his Donator, or to the Heir? *Ratio Dubitandi*, His Escheat is only of what he had the time of the Sentence; after which he became *civiliter mortuus*; and being *nullus* in Law, he had nothing to lose; And the King by his Indulgence could not prejudice his Heir, unless he had granted him a Remission restoring him against the Sentence.

*Quaritur, quid Juris*, If after he is convict, he should commit Treason, whether he might be Forefaulted in prejudice of his Heir?

### *Curator.*

*A* Female Minor being Married, *Quaritur*, If the Office of her Curator doth expire?

### *Curatores ad Lites.*

*J*ure Saxonico, *Fœmina sunt in perpetua Tutela, sed isti Curatores non habent Administrationem, & ideo Rationes non tenentur reddere; adhibentur enim tantum pro consilio & assistentia, & ad integrandam personam, maxime in Judicialibus.*

*Ex consilio suo, quod fideliter impertiuntur, etiamsi non responderit eventus, conveniri nequeunt, quia nemo ex consilio obligatur: An idem dicendum in Curatoribus ad Lites? Thes. Bes. in litera K. 47. verbo Kyegerischer. per totam pag. 474. & sequent.*

## D.

*Damnum, cum quis utitur Jure suo.*

**D**amnum est conjunctum cum injuria: Et non dicitur Damnum quod Evenit cum quis jure suo utitur.

Si vero quis ita utatur Jure suo, ut vicino potius noceat quam sibi profit, illicitum est, & prohiberi potest: Quia magis Jure suo abuti quam uti videtur.

Si in meo aliquid faciam ad emulationem & injuriam alterius, hoc est, non in meam utilitatem sed animo nocendi; alteri de Dolo Teneor.

Secus si injuriâ faciam, non animo nocendi vicino sed ut mihi profit.

Si enim in meo pradio puteum aperiâ, quo aperto, vena putei vel fontis vicini mei pracidantur, non teneor ex hujusmodi factis etiamsi promissem de Damno infecto, quia jure meo & licite feci. Textus sunt expressi, Leg. 1. §. 12. & Leg. 21. ff. de aqua pluvia arcenda, Jus Fluviat. p. 67. n. 13.

*Death-Bed.*

**I**f a Creditor may on Death-Bed make an Heretable Sum Moveable by a Charge of Horning?

A Person holding Lands Ward, when he was on Death-Bed did resign his Estate in favours of his eldest Son, with the Burden of Provisions in favours of his other Children; which course was taken of purpose, to prevent the falling of the Ward and Marriage, his Son being then Minor. *Queritur.* If his Son may question these Provisions as being in *Leſto*, upon preterence that though on Death-Bed he might Dispose in favours of his Heir, yet he could not prejudge him? *Answer.* It is thought that the said Right being made *suo modo*, and he having accepted the same and bruik-ed by vertue thereof, after Majority he cannot question the said *Modus* and Qualification.

A Person having provided his Estate both Heretable and Moveable to his Relict in Liferent, and to his Daughter in Fee, and Failzieing of her by Decease to be divided betwixt his Relict and his Brother, being his next Heir after his Daughter and her Heirs. And the Brother having accepted of a share of the Moveable Estate after the Decease of the Daughter. *Queritur.* If he might question the said Right as to the Heretable Estate as being made on Death-Bed? *Ratio Dubitandi.* *Utile per inutile non vitiatur*, and the Defunct might on Death-Bed dispose on his Moveables; And the accepting of the Right as to these does not hinder the Heir to question the same as to the Heretage; Whereof he had no power then to dispose.

A Husband having Disposed Lands by way of Gift to his Wife, and having thereafter revoked the said Gift *tacitè* by a Disposition made on Death-Bed in favours of another person. *Queritur.* If the Heir may question the said Disposition upon Death-Bed? *Ratio Dubitandi.* The Heir is not prejudged, in respect the Lands would not have belonged to him  
but



but to the Wife: And the Revocation is qualified and only in favours of the Person to whom it is made on Death-Bed, and to no other effect.

### Debitor and Creditor.

**I**F for a Sum of Money, Land be Wodfett, so that the granter of the Wadset is not Debitor, There being no Clause of Requisition or Obligation for repayment, *Queritur*, If there be only a Reversion, Whether will the granter of the Wadset have the benefite of the Act *Debitor and Creditor*; so that the haver of the Wadset may be restricted to the Annualrent of the Sum contained in the Reversion? *Grubet contra Moir*.

After a Comprising was deduced, an Infeftment of Annualrent was granted by the Debitor: And thereafter another Compriser having comprised, who pretended that his Comprising should be drawn back to the first, being within Year and Day, and therefore should be preferred to the Right of Annualrent: And that the Debitor being denuded by the first Comprising, had only a Reversion; and that an Infeftment of Annualrent is not *habilis modus*, to give a right of Reversion; and that it was not, nor could be cled with Possession; The second Comprising being before the term of payment: *The Lords* brought in the Annualrenter with all the Comprisers, as if he had comprised the same day he was infeft. *Colstoun contra Nicolas* a Creditor of *Dunglass*. *Gibson Clerk*. *Colstoun's Bond* was 16 February 1669; *Sealin* 24 May 1669, *Nicolas* Comprising 1669.

If the first Comprising and Infeftment should be considered as being to the behoof, not only of the Adjudger Infeft, but of the others, by the Act of Parliament, in the same manner as if the Infeftment had been so granted expressly by the Superior? *Queritur, Quid Juris? Ratio Dubitandi*, That even in that case the Adjudger Infeft is only Vassal, so that by him only the Superior has his Casualties. *Bancrief*.

### Nomina Debitorum.

**I**F *Nomina*, which are not *Res*, But *Entia Rationis*, have *Situm*, when the Debitor is in *Scotland animo remanendi*, and the Debt is contracted with him, as residing there? *Ratio Dubitandi*, They are thought an 1 called a Personal Interest, and therefore should *sequi Personam*. *Contra*, They are, *Res in Obligatione & potentia*. 2. If the Creditor be forefaulted in *France*, being a *French-man*, they do not forefault to that King, *Quia subditus amittit only qua sunt civitatis*. 3. They are lyable in *Scotland* to extraordinary Taxations. 4. The Debitor is *quasi servus, & servi habent situm*. To consider *Quid Juris* elsewhere, as to Banks & *montes Pietatis*.

### Strangers Debts.

**I**F a Stranger contract with a *Scots-man* abroad, that he should pay him presently upon the Place, and the Debitor nevertheless come away without satisfaction. *Quid Juris* as to that Debt, whether it be construed *Nomen Anglicum*?

*Quid*

*Quid Juris* as to *English*-debts, contracted betwixt *English-men* in *England*, if the Debitor withdraweth to *Scotland*? Answer, It is thought, that though *actor sequitur forum rei*, and the Law of *Scotland* has place in such Cases, *quoad Ordinatoria*, yet the *English* over-rule such Cases *quoad Decisoria*: And a Testament proven in *England* is sufficient.

### *Debitum Annuum.*

A Brother having given a *Life-rent*-tack to his Brother of a yearly Duty of Victual out of his Lands, to be payed yearly during all the days of his lifetime at *Martmas*; and the Tacks-man having deceased before that Term, will he have any part of that years Duty in which he deceaseth? And if there be a difference betwixt *Debitum annuum* & *Legatum annuum*, *cujus dies cedit anni initio*? Mr. William Turnbull Minister of *Meckerston*, contra Turnbull of *Minto*.

### *Debitum in Diem.*

What course should be taken when the Debt is *in Diem*, and the Term of Payment not come; and the Debtors Estate comprised, and the Comprising for other Debts like to expire before the Creditor *in Diem*, can have a Decreet and Execution thereupon? Sir Robert Sinclair's Daughrer.

### *Decimæ.*

*Av* Commencement Les dismes n'estoyent le domaine des gens d'eglise: et les dons des dismes que les Princes et Seigneurs ont fait aux Moines (qui lors n'estoient du nombre des Clercs) ont esté faites de leur biens propres?

Plusieurs payoient les dismes par devotion sans contrainte, de ces payments fut faite coustume qui causa obligation qui Engendra action pour contraindre a payer les dismes. Grimand. de dismes lib. 1. cap. 4.

La contrainte de payer dismes premierement, N'eut fondement certain sur l'autorité du Magistrat Civil, car il ne se trouve aucune constitution pour payement des dismes dans les Loix Imperiales, Ibidem.

Charlemagne fut le premier qui les commanda payer Ibid.

### *Decreets of the Lords of Session.*

Whether the Sentences of the Lords of Session should be considered as Laws, and if notwithstanding thereof, these who are of another Opinion may in cases occurring thereafter, vote according to their own Opinion?

### *Deeds both inter Vivos & Mortis Causa.*

If it appear by a Paper *in legitima potestate*, That the Defunct intended to settle his Estate, both Heretable and Moveable, Whether will the same be valide as to both, so that both a Testament and Deed *inter vivos* may be consistent in one Paper? *Ratio Dubitandi*, If at the same time there

there had been a Paper apart, in the same Terms, it had been a valid Right as to the Heretable Estate, being Delivered: And it appears that it were against Reason that it should be invalid because it is in a Paper containing a Testament, being *utile per inutile non vitiatur*. Captain Ross.

### Dependence.

**I**Nhibitions and Arrestments may be upon Dependence of an Action: *Quaritur*, If when two Citations are necessary, the Summons with the first Citation thereupon, will import a Dependence before the second Citation?

### Destination of Succession.

**A** Bond being granted to a Sister by her Brother for Provision, and to the Heirs of her Body, whilk failzieing to return to him and his Heirs: Whether may she assign it without an Onerous Cause? *Jean Drummond contra Riscarton* her Brother.

Whether the said Bond be moveable, and will fall under Executory?

*Humbie*, By Contract of Marriage betwixt him and *Wariestoun's* Daughter, being bound to resign for an Infeftment to himself, and the Heirs Male of the Marriage; Which failzieing his Heirs Male whatsoever, *Quaritur*, If there be no Heirs Male of the Marriage, will his other Heirs Male have action of Implement; The said Obligement being only in Favours of the Marriage?

If as to other Heirs (That being only a Destination) he may alter it at any time, *etiam in Lecto*, in favours of the Heir whatsoever of the Marriage? *Quod in Favorem introductum est, in odium non retorquetur*.

If a Bond were granted by a Person in the same Terms, and were lying by him, might he alter or destroy it *in lecto*?

### Desuetudo.

**L**Ex non dicitur sublata per non usum, sed per contrarium usum. Baldus ad Tit. ff. de Legibus & Cod. qua sit longa consuetudo, Heiring: de Molendinis, Quæst. 37. N. 38.

### Dies cæptus.

**I**N Favorabilibus Dies cæptus habetur pro completo: v. g. Pubes dicitur annum decimumquartum complevisse, cum diem ejus ultimum attigit.

### Dilapidation.

**T**HE Act of Parliament 1585 against Dilapidations, provides, That Bishops to be provided thereafter, should find Caution to leave their Benefice as it was at their Entry: and if the Person so provided should do otherways, the Tacks and other Deeds should be void. *Quaritur*, If they should find Tacks set at their entry, Whether they may set



new Tacks after the expiring thereof; the Benefite being in the same case by the new Tacks as at their Entry? *Cogitandum.*

### Dishabilitation.

*Quæritur*, If by our Law the Posterity of Traitors may be disabled, and what may be the import of the Dishabilitation? and whether *etiam Ante-nati* may be disabled?

### Power to Dispose, notwithstanding the giving away the Right of Fee.

**W**Hen Lands are disposed, reserving a Power to the Disposer to dispose the same in hail or in part, as if he were Fiar, *Quæritur*, If he be thereafter forefaulted, will the King have the same faculty by the Forfeiture? *Answer*, The said Faculty being Personal to the Disposer, upon personal Considerations, such Reservations being in Rights granted by Parents to their Children, to be Tyes upon them that they be dutyful; and because Parents may come to be in that condition that they may need, and it is just that they have recourse to their own Estate: Seing the said Considerations do not militate as to the Fisk, the said Faculty cannot be pretended to be transmitted.

*Quid Juris*, In the Case of a Compriser, whether the said Faculty can be comprised? *Answer*, That the Debitor having the Faculty foresaid ought to dispose for satisfaction of a just Debt; And if he be so unjust as not to satisfy the Debt, the Law may, and doth dispose: and in Law the Comprising being a Legal Disposition, is equivalent as if the Disposition had been made by himself.

### Dispositio collata in arbitrium alterius.

**A** Person not being satisfied that his nearest Kinsmen should succeed him, having a great Estate, and they but mean, and who, he conceived could not represent him creditfully; and not being fully resolved who should represent him, lest he should be prevented with death, did therefore dispose his Estate in Lands, to such two Persons most worthy of his Name; or upon Mortifications, or such Pious Uses, as Ten of his Friends named in the Disposition, being a Deed *inter vivos*, should think fit. *Quæritur*, If the Friends should accordingly name two Persons, would the Right be valid? *Ratio Dubitandi*, 1. *Mandatum expirat morte mandantis*: And if he could not dispose himself on Death-bed, much less could he empower another Person to dispose after his Decease. 2. *Paria sunt indebito tempore fieri & in tempus indebitum conferri*. 3. A Deed cannot be said to be a perfect Deed *inter vivos*, unless it were consummate in *substantialibus*, and the Person *Cui*, is *de substantia*. 4. No Power can be given by a Person, who has no Right himself but as Procurator or Commissioner, and such Powers do expire with the Granter. 5. There can no Right validly be given *incertæ personæ*, or *ex alieno arbitrio in futuro*. 6. The Defunct could not give Power to the said Friends, to dispose of his

his Personal Estate after his Decease, and à *pari* or *majori*, he could not give such a Power as to his Heretable Estate. Mr. John Bayne of *Pitsairby*.

### *Disposition.*

**I**F a Person get a Right and Disposition *omnium Bonorum*; Whether will he be lyable to the Debt of the Disponer?

### *Actio ad Distractum.*

**E**X *Contractu non agitur ad Distractum, sed ad implementum: & Contractus & Transactio non aliter annullantur ex defectu Implementi, quam si præcesserit monitio ad implendum, & deinceps culpa implere Debentis.* Hering. de Molend. Quæst. 11. N. 132. & 133.

### *Division of the Duties of Lands, betwixt Buyer and Seller.*

**B**Y the ordinary Custom when Lands are sold, If it be a *Whitsundays* Bargain, the whole years Duty is assigned: If it be a *Martimas*s Bargain, only the half year. *Quæritur*, If they be not assigned, *Quid Juris* as to the said Duties? *Answer*, It is thought, the Buyer will be in the Case, as we have said of a Compyser: But the *Question* will be if the Bargain be made after *Martimas*s, and before *Candlemas*s the ordinar Term of Payment of Victual? And then it is thought, that the Buyer should be in the same case, as if the Bargain had been made precisely at *Martimas*s, if the price be then payed, or in condition to be payed, with the Annualrent from *Martimas*s: Seing the Disponer is in no worse case than if the Bargain had been made precisely at *Martimas*s.

### *Donatio inter Virum & Uxorem.*

**A** Woman being induced to consent to a Right granted by her Husband of her Conjunct Fee Lands, and making Faith not to question it. *Quæritur*. If she may so far revock a Donation as to her Husband, that she may crave the equivalent?

*Donatio inter Virum & Uxorem* being *ipso jure* Null, But so that *morte confirmatur*. *Quæritur*. If a posterior Creditor of the Husbands should Comprise Lands given to the Wife, during the Marriage before the Husbands Death, will his Death confirm the deed in prejudice of the Creditor; The Compyring being *medium impedimentum*?

If at least the *Legal* will belong to the Wife, The Husband not Revocking?

If the Husband decease without Revocking. *Quæritur*. If the Wife will have *Action* against the Heir upon that ground, that the Debt is pay'd out of her Estate by the Compyring on the Husbands posterior Bond?

Lands being Disposed by a Husband to his Wife, and thereafter he having

having Disposed the same to another person in *Leſto aegritudinis*. *Queritur*. If his Heir may question the Right in *Leſto*? *Ratio Dubitandi*, It is not made in his prejudice but of his Wife: And the Revocation is only in favours of the Receiver of the Disposition.

A Debitor having contracted Debt after he had made a Right of Land or any other Donation in favours of his Wife. *Queritur*. If *eo ipſo* he has Revoked *Tacite* the ſaid Donation? *Ratio Dubitandi*. The *Donatio inter virum & uxorem* is Null, and *morte tantum confirmatur*; And before it became valid the ſaid impediment interveened: And ſince the Debitor might have Revoked the ſaid Gift and might have ſatiſfied the Creditor that way; his Silence and not Revocking is upon the matter fraudulent, and in prejudice of the Creditor. *It is thought*, That it is to be conſidered, if the Debitor or his Heir have no other Eſtate, out of which the Creditor may be ſatiſfied; In that caſe the Creditor may have recourſe againſt the Lands Diſpoſed to the Wife.

If in the caſe foreſaid the Wife may have recourſe againſt the Heir for the Lands given to her ſo evicted? *Ratio Dubitandi*. That if the contracting the Debt after ſuch Donations import Revocation, it ought to be only in favours of the Creditor and not of the Heir, who ought to be in no better caſe, and the Wife's Action againſt the Heir may be upon that ground, That out of the Eſtate belonging to her (unquestionably as to the Heir) the Debt whereto the Heir is Lyable is ſatiſfied.

A Woman having made a Diſpoſition to a third perſon to the behoof of her Husband, and having ratified and made Faith before a Judge. *Queritur*. If ſhe may question the ſaid Deed as being *Donatio inter Virum & Uxorem* notwithstanding her Oath? *Answer*. It is thought ſhe may: And that Deeds that in Law are invalid cannot be ſuſtained upon pretence of an Oath which ought not to be *Vinculum iniquitatis*; otherwiſe *eâdem facilitate* that a Wife is induced to give, ſhe may be induced to Swear, and the Law ſhould be Eluſory: And ſuch Oaths ought to be underſtood only, that they are not compelled, and that they ſhall not question ſuch Deeds upon that head; But not in relation to any other Ground whereby they may be questioned; As *v. g.* *Minority*, and that the Wife has Curators not conſenting: And that the Husband (if ſhe has no other) is Curator and cannot Authoriſe her to any Deed *in rem ſuam*: And the Act of Parliament anent the Oaths of Wives is in favours of Strangers and not of Husbands.

### *Donatio mortis Cauſa.*

**T**Here being a Donation *inter virum & uxorem*. *Queritur*, The Donator Deceasing and the Donant Surviving and not Revocking, whether will the Gift be Valid? *Ratio Dubitandi*. Such Donations *æquiparantur Legatis* being always Revocable: And Legatars Deceasing before the Teſtator their Legacies are void.

### *Donatio non acceptata.*

**I**F a Donation be made but not accepted. *Queritur*, If a Creditor may Compyſe the ſame and accept? *Vide* Legacy queſt. 4.

*Donatio*



*Donators upon Recognition and Forefaulture.*

**A**fter Lands holden of the King had fallen under Recognition, they fell also under Forefaulture, and after the Decease of the Forefaulted person a Gift of the said Lands was given upon the Recognition, and there after another Gift was given upon the Forefaulture; It not being known by the King or his Officers, the time of the first Gift, that the person Forefaulted had committed Treason; *Queritur*, Which of the Donators should be preferred? *Ratio Dubitandi*, That Recognition is but a Casualty; And after the Vassal was Forefaulted the property was thereby devolved to the King *ipso jure*; And all Casualties seem to be Extinct, and consolidate with the Right of property: And the Right upon Recognition does not belong to the Superior *ipso jure* before Declarator. *Mcghie of Larg.*

*Duels and Hame-sucken.*

**I**F Hame-sucken or Fighting Duels be Capital though no person be killed?

*Qui in Duello occubuerunt, in Locis religiosis sepeliri non possunt, Perez. Lib. 2. Tit. 1.*

## E.

*Emancipatio.*

**I**F by our Law, Children after twenty five years may Emancipate themselves, and live by themselves, and leave their Father and his Family? *Cogitandum*. And the custom of other Nations is to be considered.

Whether if they go out of the Family without the Fathers consent they may claim a Bairns part?

*Contractus Emptionis a Pretio incipiens aut Mensura.*

**C**um emitur fundus tot jugerum, an si plura reperiantur jugera Emptori cedant, an venditori? Respondetur. Cum pretium formatur a Mensura, & ab ea Contractus incipit, & in singula jugera certum pretium promittitur, quod superest ad venditorem redit, quod deest ab eo suppletur.

Sin Contractus incipit a specie, licet demonstrative aliqua mentio de modo agri fiat; ut si vendo fundum centum jugera continentem, si plura reperiantur, cedunt Emptori, nec ad augendum pretium tenetur: falsa enim fuit Demonstratio, qua non nocet. Thos. Bes. in litera K. 9. verbo Kauf. sen. p. 453.

*What way the Buyer may be urged to Enter.*

**I**F the Buyer lye out what will be the remedy for the Superior?

*Answer.* He may pursue to hear and see him decerned to Enter, and to

M

pay

pay Composition: And without prejudice of that Decerniture, if he continue to ly out, To hear and see it found that the Lands are in Non-entry; And that the Superior as to Casualties, shall be in the same case as if he were Entered.

### *Entry of Assigneys upon Resignation.*

**I**F the Alienation and Resignation be Assigned, *Queritur*, If the Superior may be compelled to enter the Assigney, seing both are in favours of Heirs and Assigneys? *Answer. Negativè*, Unless a Composition be payed both for the Buyer and for the Assigney: Seing the Superior is not obliged to Enter any but the Buyer and his Heirs: And though the Right be to Assigneys it is to be understood such as the Superior should be satisfied with: And the Superior is not to be in a worse case than if the Buyer had been Infeft and had Disposed: And there is in this case *Fictio brevis manus*.

### *Entry upon Resignation by a singular successor.*

**W**Hat way a singular Successor in the Right of Superiority, may be urged to Infeft upon Resignation in his Authors time; Seing he does not represent him as Heir; And is not bound to the Buyer by Contract or *quasi*? *Answer*. There is *obligatio in rem*, as in the case of Servitudes and Annualrents; And he may be pursued summarily to hear and see him decerned to Enter the Buyer: And to that purpose to give him a Charter of the Tenor Exhibited: And upon a Bill the Director to the Chancery may be ordered to give out a Precept in *subsidium*.

### *Liferent Escheat.*

**A** Vassal having granted a subaltern Right being Year and Day at the Horn, Forfaulteth only his own Right of Liferent without prejudice to the Sub-vassal: Whereupon it may be *Queried*, If a Vassal has Disposed his Right but so that the Party Acquirer is not Infeft, will notwithstanding the Disponers Liferent fall? *Answer. Affirmativè*. And the *Ratio Dubitandi* is of no weight. *Viz.* 1. A Tacksman though the duty be not proportionable will not be prejudged. 2. If the Receiver of the Disposition be Rebel *per annum*, and the Lands hold of the King, The King will get *eodem tempore* Two Liferents of the same Lands. *Viz.* One by the Rebellion of the Disponer, and the other by the Rebellion of the Receiver. For as to the first, a Tacksman has a Real Right and Interest which militates against a singular Successor. And as to the second, there is no Inconvenient that the Superior should have the Liferent of his Vassal; And if the King be Superior that he should also as King have the Liferent of his Subject; And any benefite may accrue to him by the Disposition and Warrandice thereof during his Lifetime.

If a Person Infeft in Liferent be denuded by an Assignment of the Liferent, which is only *habilis modus* (in respect Liferents constitute by Infeftment are personal, and cannot be transmitted by Resignation) *Queritur* If the Liferenter be Year and Day Rebel after the Assignment, will the Superior have Right to the Duties?

A Lady Tercer, or Tennent by Courtesy, their Lands holding of another Superior than the King, and they not being Vassals to him; Whether will their Liferent fall to the King, being year and day at the Horn?

A Person being denounced in *April*, and continuing year and day at the Horn, *Quæritur, quando dies cedit*, of the Liferent falling to the Superior of the Lands set to Tennents? And whether or not the Superior will be in the case of a Liferenter surviving the Fiar; So that he will have right in the case forefaid, to the full Duty of that year that the Liferent falls, *per lapsum anni & diei*?

*Quid Juris*, Where the Rebel laboureth himself, will he not be lyable to the Superior for the Duty of that Year, as if he were a Tennent?

If these Obligements that are ordinary in Dispositions to be holden of the Granter and Superior, *That while the Buyer holds of the Granter, his Heirs and Successors shall be entered gratis, and shall not be lyable to Non-entry nor Liferent Escheat, which are gifted to them now as then*, Will bind singular Successors? And what way they may be made real, if there be any Question? *Answer*, It is thought, that they may be inserted both in the Charter and Safine.

It may be contended, that these being upon the matter Servitudes upon the Superiority, may be constitute as other Servitudes without Write; specially seing it is intended they should hold either of the ways; and that the Right in the Person of the Disponer to be holden of the Superior, is in effect to the Buyers behoof, until they be confirmed: And Reversions were Real, even before the Act of Parliament anent the Registration of the same, *Cogitandum*. If at least Comprisers will be lyable to such Obligements? Seing they comprise only such a Right as their Debitor had: and they are in use to comprise all Contracts and Dispositions, and therefore ought to be lyable *in rem* to all Obligements upon the Debitor and his Successors, relating to the Lands comprised.

*To consider*, If there be not a Difference betwixt Obligements as to Liferent Escheat and others; these as to Liferent Escheat being contrary to Law, and such as give *occasionem peccandi*; and if such an Obligation be not sustained, to whom will the Liferent belong? Whether to the mediate Superior, seing the immediate has renounced? or to the King as *ablatum ab indigno*?

If a Liferent Escheat be gifted to the Rebel himself, being yet at the Horn, Whether will it fall under his single Escheat, or Liferent to the King?

If the Liferent be gifted by the Superior to the Vassal himself being relaxed; and if thereafter he be Year and Day at the Horn. whether or not his Liferent will of new fall to the Superior? *Ratio Dubitandi*, he cannot have two Liferents of one Person.

If there be a Difference betwixt the Casualties of Ward and Non-entry, and a Liferent Escheat, which has also *tractum temporis*; in respect the Liferent Escheat falleth *ex delicto*, and but once, and is *Jus collectivum* of all Years falling under Liferent: Whereas Ward and Non-entry are of the Nature of *Annua Legata*, and are in effect *annua cessiones*, which are only Effectual during the Cedents Right? *Vid. Title, If Gifts of Ward and Non-entry prejudice singular Successors, in Lit. G.*



If a Person being at the Horn should suspend and relax, and thereafter the Letters being found orderly proceeded, should be Denounced, *Quæritur*, If the time of the former Rebellion would be continued with the last as to the Question of the Liferent, as if the Rebel had not been relaxed?

When Reversions, or Minuts bearing Obligements to dispoſe in favours of the Rebel, do fall under Liferent Escheat, *Quæritur*, What benefit or Right will the Donator have? *Answer*, It is to be considered, what benefit the Rebel would have: and the Liferent thereof will belong to the Donator.

If an Heretor be year and day at the Horn, and there being a Subaltern right holden of him for a small Feu-duty, the Superior would get his Liferent only as to that Feu-duty, there being no more his.

*Quæritur*, If there be a Liferenter holding of the Superior, and she having assigned her Liferent during her lifetime, Whether or not the Superior will have right to her full Liferent, without respect to the Assignment? *Et quæ Ratio differentiæ?* *Answer*, The subaltern Right was a real and valid Right, constitute *habili modo*, which could not be prejudged by any Deed of the Heretor: Whereas the Assignment made by the Liferenter is only personal, as a Disposition made by the Heretor, which depends upon the real Right; and *eo resolutio*, falleth.

### *Escheat single.*

**I**F an appearand Heir have right to a moveable Heirship, and the same or nearest of Kin have right to be Executor, but neither the one is served, nor the other confirmed, and both be at the Horn: Whether will their Interest foresaid fall under Escheat, as in the case of Forefeiture; Seing Escheats are Forefeiture as to Moveables?

If a Tack being for many nineteen Years, should be assigned; Will the same fall under the single Escheat of the Assigney, seing there is no Liferent as to him, and the Liferenters may all die in his lifetime?

Will not the Assigney have right for the lifetimes of the Heirs, though they be not served Heirs?

The Tack being for three lifetimes, and certain nineteen years after, *Quid Juris*, Where the Tacksman has no Heirs, so that there is place to a Gift of Bastardy or *ultimus Hæres*?

A Tack of Teinds being granted to the Tacksman and his Heirs and Assigneys, for three Liferents, and three nineteen Years; and being thereafter assigned, *Quæritur*, If the Assigney be at the Horn, Whether it will fall under his single Escheat? *Answer*, It is thought it will: seing it is not a Liferent Right as to the Assigney, and the whole Liferents may be determined during the Assigneys lifetime: and a Tack for three nineteen Years doth fall under single Escheat.

*Quæritur*, If a Tack exceeding the Life of Men, *v. g.* for eight nineteen Years, falls under single Escheat?

### *Escheat without Backbond.*

**I**F the King may regrant Escheats, without a Back-bond, and declare that it is his pleasure so to do? *Answer*, It is thought that the King

in no worse case than other Superiors, who do always give Escheats of their Vassals Liferent, (and if they be Lords of Regality their single Escheat) without Back-bond.

### *Delivered Evidents.*

**A** Person having a Bond of *fifty thousand Merks*, did assign the same to the Debitor; But so that the Debitor by the Assignment and accepting thereof, was obliged to pay the said whole Sum (reserving the Cedents Liferent) to the persons therein mentioned amongst them, *Queritur*, The Assignment being never delivered to the Assigney, and recovered after the Cedents decease, *viis & modis*, Whether it will be a binding Writ? *Answer*, The Case will not be without question. *Ratio Dubitandi*, That Deeds and Writs that are single and *monopleura* do not bind, unless they become the Parties Evident by Delivery: and on the other part, Contracts subscribed by two Parties retained in the hands of one, are valid though not delivered to the other: and the said Assignment is not a simple Deed, but bears reciprocal Obligements which are as binding as if they were subscribed by both. 2. The said Assignment, though it appears to be *actus inter vivos*, yet upon the matter is *donatio mortis causa*, and the Defuncts will as to her whole Estate, and to whom it should belong after her decease: and such Writs, being of the nature of *Wills* and *Legacies*, may be retained and are valid though not delivered. *Lady Margaret Kennedy.*

### *Exception against the Cedent, if always competent against the Assigney?*

**Q***ueritur* in general, If all personal Obligements, and Exceptions competent against the Cedent, be competent against the Assigney? And what reason there is, that *Discharging Compensation*, and the *Suspending of Payment for a time*, and such like; should be competent against the Assigney: and not such as are founded upon correlative Writs, which import Retention, or Suspending of Implement against the Cedent?

### *Executor.*

**I**F the Executor *ad omiffa* be countable to the nearest of Kin, who are not accessory to the Fraud of Omission?

If the Creditors and nearest of Kin have such an interest in the Goods confirmed, that they are preferable to the Executors own Creditors? or if after Confirmation there be a Confusion, as in the case of an Heir?

When there is only one Child, who is both Heir and Executor; Whether there will be only a Bipartite Division, betwixt the Defunct and Relict? *Lady Craigleith.*

If an Executor Creditor be lyable to Execute the Testament fully, or only so far as may satisfy himself?

If the Defuncts Estate be so settled in the Person of the Executor by Confirmation, that there is a confusion of it with his own; so that his Creditors

tors may affect, and evict it being in Money or in Goods; and doing *prior* diligence, will be preferred to the Defuncts Creditors? *Ratio Dubitandi*, The Executor is *heres in mobilibus*: On the other part, he has only an Office, and the Administration is committed to him by the Commissars, and he findeth Caution to make forthcoming; and if he die before the Testament be Execute, another will be confirmed *ad non executam*, and upon the matter he is *Curator Bonis*.

A Child being confirmed Executor to the Grandfather upon the Mothers side, and dying without Issue and either Brothers or Sisters: Will the Father have right to the Executory as Executor to the Child? 2. What if the Child decease before the Testament be execute? 3. Can the Father be Executor *ad non executam* to the Grandfather? Mr. Andrew Marjoribanks Daughter.

Executors nominate (though Strangers, and not Universal Legators) before King James his Act of Parliament, had right to the whole Executory; and since to the Third; *Quaritur*, If they decease before Confirmation, Will they notwithstanding have right as Legators?

If they be Confirmed, and die immediatly before the Testament be execute, Whether the Executor-Stranger will have right to the Third?

The Office of Tutrix ceaseth by her Marriage, but not that of Executrix, *Quaritur, Quæ Ratio Discriminis?* Answer, She being in *Tutela* herself, cannot be Tutrix to another. 2. An Executor has not *nudum Officium*, but is Heir *in mobilibus*: and for that Reason, a Woman may be Executrix, though incapable *munerum virilium*.

Testaments appear to be Executed by Sentences: Seing after Sentence the Executor may Assign.

Albeit *quod est Cessibile* may be Compyred, or affected with the Cedents Debt: Yet if after Sentence, the Debts and Goods be extant, The Creditors Legators and nearest of Kin will be preferable to the Creditors of the Executor: Because though they may seem to be secured by Caution, yet the same is that the Inventar shall be made forthcoming, and *tutius est incumbere &c.* And the Executor is *Heres fideicommissarius* or *Curator bonis*, and if he Sell or Assign *presumitur* That he doth so that he might satisfy Creditors, Legators and nearest of Kin; but where the same is evicted for his own Debt, it is upon the matter Unjustice and Malversation.

Seing the Interest and Right of an Executor is *jus anomalum & Participium*, being partly considered in Law and constructed to be *hereditas in mobilibus*; and partly *Officium* to execute the Defuncts Will if he Dye Testated, and the Will of the Law if he Dye Intested; And therefore if a Woman be Executrix, albeit she be only Dative, if she marry she is not in the case of a Tutrix and Curatrix: Albeit it may be thought that an Executor Dative is *Curator datus bonis*, and she ceases to be Tutrix and Curatrix if she Marry, because these are only *nuda officia*; But she continues still to be Executrix: And yet if an Executor Dye before Execution his nearest of Kin will not succeed to him in that Interest as Executor to him; So that he may be confirmed Executor to him in the Goods confirmed, but there must be a Testament and Executor *ad non Executam*, not to him but to the former Defunct: Whereupon diverse Questions arise, And first, if an Executor nominate die after the Confirmation but before Execution, will he have



have by the Act of Parliament the third of all the Goods of the Deads part, or only in so far as the Testament is Execute? *Ratio Dubitandi*, Before the Act of Parliament the Executor had the third entirely, viz. The Defuncts part without respect to the Execution, But only the confirmation being in place of addition: And by the Act of Parliament he is restricted to a third of that. And on the other part, since that Act of Parliament, It is presumed, according to that Law, The Defunct intended only the third of his part to be given to the Executor, in respect of the Trouble and pains he is at to Execute, and recover *bona Defuncti*, and therefore he should only have a proportion of what is Execute.

If the Executor nominate Decease before he confirm, will he have any part of the Deads part? Which will be cleared by an Answer to the former.

When the Procurator Fiscal is confirmed after an Edict served, Whether will the nearest of Kin being Majors the time of the Confirmation, and not owning their Interest, be excluded; So that they can have no Action against the Procurator Fiscal or Bishop for the Goods contained in the Inventar?

*Quid Juris* as to the nearest of Kin for the time; And if he be Reponed whether will he have action of Compt and Reckoning, or must he reduce the Confirmation so far as that he may be confirmed; The Procurator Fiscal being satisfied of all Charges? *Ratio Dubitandi*, That the nearest of Kin is not *nomen juris* to succeed, or to have any thing belonging to the Defunct unless he represent him, which he cannot unless he be confirmed Executor.

*Quid juris*, In the case of an Executor Creditor after he is satisfied, will the nearest of Kin be excluded? And if not, what is the *habilis modus* to get a right settled in his Person? *Ratio Dubitandi*, In suffering the Creditor to be confirmed, it seems that he has disclaimed his Interest, and not without injury to the Memory of the Defunct: And the Creditor being once confirmed, the nearest of Kin cannot be confirmed: And having Forefaulted his Interest, it may seem, *quod indigno aufertur, est Fiscis; & quod nullius est, est in bonis Regis*.

*Queritur*. When Testaments are Execute, so that there is no place to a *non Executa*? And if as to Goods whereof the Executor is presently in possession it be not fully Execute? And as to *nomina* and Debts it be not Execute by Sentence, though they be not uplifted; Seing after Sentence the Executor may Assign? And in that case, may not the Executors Executor confirm the same as belonging to the Defunct?

Though after Sentence the Debt be *in bonis* of the Executor, and confounded with his own Estate: If there should be a Competition betwixt the Executors own Creditors, and the Creditors of the Defunct or his Relict and Bairns; Would not the Creditors and the Relict and Bairns of the Defunct be preferred to the Creditors of the Executor, upon that Ground that they are not simply the Executors Goods but in Trust; and is a *fidei commissum* for the use of the Defuncts Creditors and his Relict and Bairns: So that both the Executors Creditors and Fisk ought to be excluded upon any such Competition?

If the nearest of Kin will not be Executor: *Queritur*, What remedy will be competent to the Creditors, not of the Defunct but of the Executor:

tor; Seing there is an Act of Parliament, in case of an Heirs not entering: But not in the case of an Executor in behalf of Creditors?

If the Commissars should confirm the Creditor of an Executor nominate and the Executor decease, will the next nearest of Kin have Action against the Executor Dative to be Comptable? And whether that Executor will have the priviledge of an Executor Creditor? And if he may be pursued at the instance of other Creditors who are not Creditors to the Defunct?

An Executor being nearest of Kin and confirmed, but immediatly dying, *Quid juris*, will his nearest of Kin be confirmed Executors *ad non Executa*, if there be another nearer to the first Defunct?

To consider the Civil Law as to *Hæres cum beneficio Inventarij*: If an Executor be not *Hæres in mobilibus cum beneficio Inventarij*?

### Executor Creditor.

A Creditor being confirmed Executor and dying before the Testament be Executed; Will not his nearest of Kin be confirmed *ad non Executa* and exclude all other Creditors, in respect of the Diligence of his Predecessor, and that Confirmation did affect the Goods for their satisfaction?

Three Creditors being confirmed for their Respective Debts, and one of them deceasing before Sentence. *Quæritur*. Will the Office and benefit belong to the Survivors entirely? *Ratio Dubitandi*. A Testament Creditor is a Diligence, and there is no other way of Diligence to affect the Moveable Estate of a person deceased, and it is equivalent to diligence against Debtors on Life, affecting their Moveables. And on the other part, Executory being an Office the Law preferreth the Creditor, If the nearest of Kin do not own it; But *cum sua causa*, and so that the nature of the thing is not altered: And therefore the Executor dying, the Office and Diligence doth vanish.

*Quid juris* in the case of an Executor Creditor: If after he is satisfied the nearest of Kin will have an Action for the superplus?

If a Testament be Execute by a Sentence against the Debtors, though payment be not made? *Vide Hope*.

### Executor Nominate.

IF an Executor Nominate be Lyable as a Tutor; not only for what is confirmed but what he might have confirmed and intromitted with? *Tweeddale contra D. of Monmouth*.

### Executory.

Whether *Universitas bonorum*, That is an illiquid Right; Though the Subject may consist of Moveables as a single Escheat, Conquest, Society as to a Trade or Shipping; Will fall under Executry?

If Casualties of Ward, Liferent Escheat, Non-entry, Marriage, will fall under the same? Or to the Superiors Heir?

There being a Bargain of Lands, *in nudis finibus contractus vel Dispositionis*

*tionis*, will the Price belong to the Heir who must perfect the Bargain? *Answer*. It is thought not; Seing the Price is a Moveable Sum: And it appears that the Defunct having sold the Lands had use for it, and did intend to uplift it.

Whether a Gift of single Escheat will fall under Executry or belong to the Heir? *Ratio Dubitandi*, That the Escheat is *jus Universitatis*, And nothing is in use to be confirmed but either particular Moveables or Debts, and plenishing estimate *in cumulo*,

*Item*, Whether a Gift of Liferent Escheat (which as to the Donator is a Moveable Interest) will fall under Executry? *Ratio Dubitandi* As in the former: And likewise that during the Liferenters Lifetime it cannot be construed, what it will amount to: And it has *Tractum futuri temporis*.

The same Question may be as to a Tack Assigned.

Whether the Heir who has Right to a going Coal, will have Right to Buckets, Chains, and other Instruments as being *accessoria* and *destination* addicted to the Coal, as the Colliers: Or if they will fall under Executry?

A Person being about the building of an House; And the samen being begun and certain Materials (as Stone, Lime, Slats and others) being prepared to that use: Whether will they belong to the Heir (for the reason foretold) or fall under Executry?

A Daughter having accepted her Tocher and Provision by Contract of Marriage; *in satisfaction of what might fall to her either by her Father or Mothers Decease*, The Contract of Marriage being after her Mothers Decease. *Queritur*, If another Sister will have the Mothers part entire without respect to her Sisters Interest; being renounced as said is? *Ratio Dubitandi*, That the Father who is Lyable for his Wifes Third, is in Effect Discharged as to his other Daughters part of the samen: And on the other part, the Mothers part belonging to her Children, *non jure Legitima* as Bairns, but as Executors and representing her: If any of them Decease before Confirmation, or be unwilling to confirm, their Renunciation will be ineffectual as by a person not having Right.

*Queritur*. If the the Sister who is not Excluded should confirm: If the Sister who is Excluded (as said is) may at least have Action against her for her part of the Mothers part: To the effect that the Discharge in favours of her Father may be effectual? *It is Answered*, That unless she be confirmed her self, she can have no part of that which belonged to her Mother: And albeit by the Act of Parliament anent Executors Nominate, the nearest of Kin has Action for the superplus of the Deads part exceeding the third; That is only in the case therein mentioned, the said Act giving *Condictio-nem ex lege* in that case only: Whereas that Act doth not militate in other cases where there is no legitime, but only an Interest to represent; which cannot be effectual *sine Aditione*: Confirmation being in effect *Aditio in mobilibus*.

*Queritur*, If a moveable Escheat will belong to the Executor, seing Moveables belong to the Executor; and moveable Sums, and other moveables fall under the same? *Answer*, It is thought that Escheat being *jus Universitatis*, should belong to the Heir: Seing not only *mobilia* do fall under the same, but also such Rights and Interests as cannot belong to an Executor, as Tacks if they be not Liferent Tacks: And it is the stile of



Gifts, that the Escheat should be holden of his Majesty; which does not quadrate, and is not proper to be said of such things as belong to the Executor.

### Extent.

**I**F the Inquest be warranted to Extend, unless there were former Returns upon a Commission to Extend?

### Extinguishment of Rights.

**I**F the Heretor of *Prædium Dominans* acquire the Right of *Prædium serviens*, Whether doth the Right of Servitude extinguish; *quia res sua nemini servit*; So that if he sell the *Dominans*, the Servitude doth not revive?

If the Heretor of Land acquire a Right of Annualrent out of the same; Whether or not is the said Right of Annualrent extinguished or suspended only; So that it may revive if the Right of Property be taken away by Reduction?

## F.

### Faculty to alter,

**L**Ands being disposed with power to alter, without these Words, *Etiam in Læto*; If that Faculty may be used *in Læto*?

A Person having reserved a Power to alter *in Læto*; May he then use that Power, in favours of any other Person than his Heir; seeing he is not *in legitima Potestate* as to the disposing an Heretable Interest: and on the other Part, the Heir has no prejudice?

### Faculty to Dispose.

**B**Y a Write granted by the *Earl of Callender*, to his Lady, he gives her power to dispose of the half of his Estate, *Quæritur*, The said Power being Personal, without mention of her Heirs, and she not having used the said Faculty; If the said Power be Transmissible? *Found by the Lords* That the *Earl of Dumfermling* as Heir to his Mother, had right thereto: and he having assigned the same to his Son, he recovered thereupon the half of the Estate, *To see the Decreet.*

### Jus Facultatis.

*Attendendum, an quis aliquid faciat jure facultatis an jure servitutis; Facultas enim non minus aliis quam nobis patet: quia usus qui alii magis ex occasione quam jure contingit, Servitus non est, nec in eo temporis Diuturnitas*

*nitas quidquam prodest, nisi accesserit prohibitio præscribentis, & patientia ejus contra quem præscribitur Jus Fluviat. p. 756. N. 71. & sequent.*

### Personal Faculty.

**A** Person giving a qualified Right, reserving Liferent and a Power to dispose: *Quæritur*, If that Faculty may be comprised as a Personal Reversion?

### Quæ Facultatis sint?

**A** *Liqua Dicuntur esse facultatis, quorum Libertas a Jure publico permissa est, quæ non pariunt jus deducibile in Judicium: hoc casu nec nos contra alios præscribimus, nec alii contra nos; Exemplum est in Leg. viam. 2da. de via publica. Aliud Exemplum est in facultate privata, quæ nullam antecedentem habet causam obligandi; ut si Rusticus sua sponte, nulla præcedente causâ, per multos annos, Domino, certis temporibus, capones attulit; ex hoc actu meræ facultatis nulla oritur Domino actio.*

### Quomodo intelligendum, Facultati non præscribi.

**A** *Liqua dicuntur esse Facultatis ad acquirendum novum Jus, vel novam actionem; vel etiam ad eam Conservandam: atque ita pariunt Jus deducibile in judicium. Et hoc jus licet sit in libera potestate acquirere volentis, non tamen est in potestate illius contra quem acquiritur, vel conservatur, ut recusare posset. Sic adire hæreditatem est meræ facultatis, & tamen tollitur & præscribitur spatio 30 annorum; ergo & juri offerendi, & reluendi præscribitur. Hering. de Molend. quæst. 21. N. 17. & sequen.*

*Jus publicum tribuit cuius de Populo, ut uni ex multis, nec privative ad alium, etsi ad singulos inde aliquid commodi perveniat: Inde illud quod dicere solent, Facultati non Præscribi, Dicitur de his quæ à natura, aut publico Jure tribuuntur; itaque quocunque tempore, nemo præscribit ut quæ erit in publico nullus alius commeet, etsi nunquam ea commearit.*

*Ea quæ de tali facultate dicta sunt, non recte Traducuntur ad ea quæ proprii & privati cujusque Juris sunt; id enim Jus est quod ad privatum quemque pertinet privativè, ita ut non ad alium: Omni siquidem Juri aut facultati quæ competit privato cuiquam privativè, potest præscribi. Idem Ibid. N. 20.*

### Faculty reserved to dispose.

**I**T being ordinary that a power is reserved by these who Dispose Lands, especially to their Friends, to Redeem or Dispose or Burden at any time during their Lifetimes. *Quæritur*, Whether Lifetimes should be understood civilly, during their Liege Poustie?

*Item, Quæritur.* If the Receiver of the Disposition be Dead and the Lands in Non-entry, whether the Disposer may notwithstanding Dispose and resign by vertue of the said Power? *Ratio Dubitandi*, The said Faculty is upon the matter a Heretable Commission and Procuratory, which

which cannot be Execute *post mortem mandantis*: and there is no person that has the Right Established in his person so that it may be resigned.

*Item.* If the Lands be in Non-entry and Ward, will the Resignation by vertue of the said Faculty determine and put an end to the foresaid Casualties in prejudice of the Superior? *Ratio Dubitandi.* The Defunct by whose Decease they accrue was the Superiors Vassal: And though the Disponer has the same power, yet he should have used it *debito tempore*, while the Vassal was on Life, and before the pursuer had *jus quæsitum*: On the other part, the said power is of the nature of a Regress, so that *quocunque tempore* (as in the case of regress) Re-entry may be desired by vertue of the said Faculty.

A Charter being to be granted to a person conform to the said power; That Clause, *Quæquidem pertinuerunt*, what way it is to be conceived; and if mention should not be made of the person who is Infeft for the present, though he be not the person to whom the Right was Disposed with the said Power; But either an Heir or singular Successor?

If the Faculty to Dispose be not upon the matter a Reversion, materially and asto the effect of the same; so that the person having the same, may Dispose albeit he has not *jus in re*; And albeit the Heretor be either Dead or Forfaulted; As an order may be used against an Appearan Heir, or against the King or his Donator, in the case of Forfaulture or *ultimus Hæres*?

A Person who had the Faculty foresaid, having by vertue thereof Disposed, but deceasing before Resignation, *Quæritur*, What way the Disposition shall be made effectual, seing the Faculty was personal to himself?

### Fee.

**W**HEN by a Contract of Marriage a Sum is to be provided to a Husband and Wife in Liferent, and to the Bairns in Fee; Which Failzieing to the Father and his Heirs. *Quæritur*. Before there be Children where is the Fee? And if it be not fit to take it to the Father to the use and behoof of the Children, which Failzieing to himself and his Heirs?

When it is intended that by Contract of Marriage the Parents should be only Liferenters, and that certain Sums should be provided to the Children, so that they do not represent them, *Quæritur*, What way the Fee can be provided to the Children that are not in being? *Answer*, The Father may be infeft in Liferent for himself, and in Fee for the use and behoof of his Eldest Son and his Heirs: Which Fee is to be to the Father and his Heirs, to the use foresaid: And they are to be obliged upon the Existence of a Son, to denude in Favours of him and his Heirs.

By Contract of Marriage betwixt Knockdam, Sir John Kennedy, and Gilbert Kennedy of Girvanmayns, The said Sir John having married the said Gilbert's Daughter; The said Gilbert's Lands and Estate are disponed to the said Sir John and his said Spouse, and the Heirs betwixt them; which failzieing, to such of the said Gilbert's other Daughters, as he should at any time appoint; which failzieing, to the said Sir John's Heirs and Assignes whatsoever: and now the said Sir John being deceased, and having a Son of the Marriage, *Quæritur*, Whether the Fee did belong



to him, so that his Son may be served Heir to him in the Estate? *It is Answered*, That in the case of the *Duke and Dutcheſs of Monmouth*, The Conception of the Tailzie not being unlike, it was thought the *Dutcheſs* was Fiar; albeit the Limitation of the Heirs did ultimately reſolve in the *Dukes* Heirs; upon that ground that there is a difference betwixt the caſe where the Lands are provided and Diſponed to the Husband and the Wife, and the Heirs of Marriage; which Failzieing either to the *Husbands* Heirs, or *Wifes* Heirs: And in the caſe foreſaid where after the Heirs of the Marriage there are diverſe ſubſtitutions, in favours of the Wife's other Heirs; and after all in favours of the *Husbands* Heirs. In the firſt, if the Wife's Heirs be only ſubſtitute Failzieing Heirs of the Marriage, the Husband is underſtood to be Fiar; Becauſe as it is the eſſence of a Fee to have power to Diſpone, and if the Fiar do not Diſpone to tranſmit to the *Fiars* Heirs, and to be repreſented by them: And *in dubio cujus heredibus maxime proſpicitur*, That perſon is thought to be Fiar. But in the ſecond caſe, there being diverſe degrees of Subſtitutions and all in favours of the Wife and her Heirs, before her *Husbands* Heirs, The Wife is thought to be Fiar: And upon the Failzeure of all her Relations, the *Husbands* Heirs in the laſt place are Heirs of proviſion to her; And yet in the ſaid caſe of *Girvanmains*, It is thought that the Husband is Fiar, there being theſe ſpecialities in that caſe. *1mo.* The ſaid Estate is Diſponed to the Husband, and his Spouſe the longeſt Liver as ſaid is and their Heirs of the Marriage; and there is no Liferent ſettled on the Husband, whereas there is a Liferent of a part of the Lands given to his Wife in ſatiſfaction of what might fall to her either of her Fathers Estate, or of her *Husbands*. *2do.* There is a proviſion that if there ſhould be no Children of the Marriage to ſucceed to that Estate, the Husband ſhould be obliged in that caſe, he and his Heirs to denude themſelves upon payment of a certain Sum of Money; and he could not denude himſelf unleſs he were Fiar: So that it was intended that the Husband ſhould be Fiar, but with the foreſaid Proviſion to denude in the caſe foreſaid, and to be reſtricted to a Tocher: For which and other Reaſons ariſing upon the Contract, The *Antecedentia* and *Conſequentia* being conſidered, It is thought that the Son ſhould be Heir to his Father as Fiar.

A Bond being granted to a Man and his Wife, and their Heirs. *Quaritur*, What Right the Wife will have to the Sum? *Ratio Dubitandi*, that there being no mention that the Sum ſhould be due to the longeſt Liver, and the Heirs of the longeſt Liver, but to them both and their Heirs, It appears that the Heirs ſhould be underſtood the *Husbands* Heirs as *Perſona digniores*. *Answer.* It is thought that ſeing there is an joint Right to the Husband and the Wife, and it is the cuſtome of Perſons of their Quality being mean Country Perſons, that the longeſt liver ſhould enjoy all: The Wife *indubie* ſhould enjoy the haill in Liferent and ſhould have the Fee of the half.

### *De Feodo Pecunie & Nominum.*

“**P**ECUNIA & NOMINUM nec proprie Uſusfructus nec Feodum eſt; uſusfructus enim deſinitur jus utendi fruendi ſalvâ, rerum ſubſtantia: “pecunia autem ſive in ſpecie, ſive in nominibus eſt res fluxa: Et ſi in  
P “ſpecie

“specie sit facile diffluit & usu consumitur: Nomina autem etsi initio idonea; debitoribus decoquentibus, inania sunt. Quemadmodum vero ob utilitatem receptum est, ut pecuniæ sit quasi usus fructus ita est quasi feodum: istud enim proprie loquendo est tantum in rebus soli & stabilibus & feudis tantum; non vero allodialibus (ita dictis quod nullo laudato & recognito alio dominio, ad proprietarium pertinent pleno & integro jure nec libato & diviso in Dominium directum & utile: Licet autem apud alias Gentes prædia quædam allodialia sint, nobis omnia sunt feudalia.) Et Feodum quidem in feudis de proprietate & dominio dicitur, prout distinguitur ab usu fructu & aliis quæ circa feuda versantur juribus: Per Metaphoram tamen Feodum transfertur ad pecunias & nomina ita ut is in Feodo esse dicatur cui jus summum & proprietatis competit: plerumque vero evenit si seculi vitio (in nova commenta prurientis) si Notariorum Incuria aut imperitia ut Chirographorum stylus a primæva simplicitate defleat, sic haud raro nec immerito dubitatur penes quos sit pecuniæ & Nominum Feodum.

### Quæstio Prima.

“S Igitur *Sempronius* Pater, Pecuniam crediderit & Chirographo stipulatus sit eam & usuras sibi solvi si superstes sit; Eo autem per obitum deficiente *Titio* filio suo & *Titii* hæredibus & quibus dederit, seu assignatis: Ita tamen ut *Sempronio* liceat de pecunia & Nomine disponere *Titio* & hæredibus ejus inconsultis nec consentientibus: *Quæritur*, In ista facti specie ad quem nominis istius Feodum pertineat? Et videri possit Feodum ad *Titium* filium pertinere cum nulla sit mentio *Sempronij* hæredum: Et Feodi ea sit natura ut ad hæredem transeat, qui in jure eadem persona censetur: Dicendum tamen *Sempronium* in Feodo esse; penes *Titium* vero & ejus hæredes spem & jus successionis: Nam quæ Feodi & proprietatis vel essentialia vel naturalia sunt (ut scilicet.) Dominus de re sua disponere possit & ut ea ad hæredes transeat) ea *Sempronio* competunt; potestas enim disponendi etiam non expressa in effect; & *Titius* *Sempronio* substitutus in jus ejus succedit & pro hærede habetur (provisionis saltem ut loquimur) idque ex eo eluciscit quod si accessisset etiam hypotheca & fœna, terris pro Pecunia in hypothecam datis, in eadem conceptis verbis *Sempronio* scilicet.) & eo deficiente *Titio* filio & ejus hæredibus & assignatis; *Titius* eo casu extra omnem quæstionis aleam hæres foret: ubi autem eadem sunt verba & eadem ratio, idem jus est & esse debet.

### Quæst. 2da.

“I N ista facti specie supra memorata, *Quæritur* etiam an *Sempronius* de isto nomine disponere possit, nedum inter vivos sed Testamento aut codicillis eo legato; cum debitum Chirographarium & mobile sit?

“Respondendum videtur, *Sempronium* eo ipso quod tam hæredibus quam executoribus præteritis, *Titium* elegit & substituit sibi, instar hæredis provisionis, & interciso ordinario succedendi ordine quasi Tallia; *Titium* in ea re hæredem esse voluit: Voluisse etiam nomen esse hæreditarium, “de

“de quo moribus nostris nisi inter vivos non licet disponere; nec de ea re est  
 “Testamenti factio: Nec ad hæredem institutum in mobilibus seu exe-  
 “cutorem nominatum pertinet, quod ab intestato ad Executorem dativ-  
 “um non pertineret.

### Quæst. 3<sup>ta</sup>.

“IN ista etiam specie, *Quæritur*, Si Chirographum in actorum codi-  
 “cem seu Regestum (sive ut loquimur Registrum) referatur, vel a  
 “*Sempronio*, vel eo mortuo a *Titio*, ut instar sententiæ habeatur & ex eo sit  
 “executio parata: An eo casu *Titio* executio competat; ita ut Literis Exe-  
 “cutorialibus & Cornuatiomis (ut loquimur) impetratis, debitori man-  
 “dari possit ut *Titio* solvat sub pœna Rebellionis: Et comminatione ni  
 “pareat, eum Exlegem & Rebellem denunciatum iri?

“*Respondetur*. *Titio* actionem quidem competere adversus debitorem,  
 “non executionem summariam, cum non sit Creditor primarius & ab  
 “initio, sed jure successionis ut substitutus & hæres talliæ aut provisionis:  
 “Hæredi siquidem ex Chirographo nunquam executio summaria compe-  
 “tit, nisi a decessore in acta relatum & post ejus obitum in hæredem tran-  
 “slatum sit; vel hærede agente per viam actionis ut in acta referatur, de  
 “ea re sententia sequatur.

“Quæstio ista, utpote de formula, haud magni momenti esse videtur;  
 “eventu tamen fieri potest ut sit maximi: Processus enim cornuatiomis ex  
 “longa & catenata serie diligentiae conflatus, magno temporis & operæ &  
 “sumptuum dispendio ad ultimam forte metam deductus inanis corrueret;  
 “si constiterit *Titium* haud rite processisse, cum ei summaria executio  
 “haud competeret; adeo multum est bene cœpisse: Sublato enim funda-  
 “mento superstructa corruunt, & paria sunt in jure *non fieri & non rite*  
 “*fieri*.

### Quæst. 4<sup>ta</sup>.

“IN specie supradicta Respondimus nomen in persona *Semproni* pri-  
 “marii creditoris hæreditarium: Supereff tamen adhuc scrupulus &  
 “quæstio an in persona *Titii* substituti sit etiam hæreditarium, an vero ut  
 “mobile ad executores *Titii* pertineat? Sed

“*Respondetur*, Nomen etiam quoad *Titium* hæreditarium esse: absur-  
 “dum enim foret, partim hæreditarium partim mobile esse: & cum ab  
 “initio hæreditarium sit non desinit esse hæreditarium; nisi creditor vel  
 “substitutus facto aliquo declaret naturam nominis innovatam velle; li-  
 “teris forte impetratis & debitore jussu solvere sub pœna Rebellionis.

### Quæst. 5<sup>ta</sup>.

“IN illa facti specie superius memorata, cum essent quinque rei deben-  
 “di in solidum, uno ex iis defuncto, *Sempronius* creditor de eadem  
 “pecuniæ summa sibi dari curaverat ab hærede ejus syngrapham seu obli-  
 “gationem corroboracionis; sic dictam quod priore obligatione salva ad  
 “eam ut accessoria et auxiliaris accedat eamque corroboret: eaque obli-  
 “gatione stipulatus fuerat pecuniam sibi solvi, ipsoque per obitum defi-  
 “ciente



“ciente non *Titio* ejusque hæredibus in principali obligatione substitutis,  
 “sed *Gaio* ejusque hæredibus: *Quæbatur* igitur utrum post mortem  
 “*Sempronii*, pecunia ad hæredes *Titii* præmortui ex prima substitutio-  
 “ne; an vero pertineat ad *Gaium* ex secunda?

“*Respondendum*, Videtur eam ad *Gaium* ejusque hæredes pertinere:  
 “*Sempronius* enim facultate usus quam sibi reservaverat, & quæ etiam  
 “non expressa penes eum ut dominum & feudatarium fuisset, novissima  
 “substitutione priorem sustulerat: & licet notarii imperitia aut oscitan-  
 “tia haud cautum sit pecuniam solvendam tam ex principali quam acces-  
 “soria syngrapha *Gaio* & ejus hæredibus; id tamen jus supplet & sub-  
 “intelligit: posteriora siquidem derogant prioribus; nec possibile est ut  
 “idem jus sit in solidum penes plures & diversos creditores: ad hæc in  
 “iis quæ sunt facultatis & arbitrii, voluntas posterior operatur & prævalet  
 “utrunque expressa; & magis valet quod agitur quam quod concipi-  
 “tur.

### Quest. 6ta.

“**H**Aud dissimili ratione, si debitum sit hæreditarium (hypotheca-  
 “rium *sciz.*) addito pacto de terrarum hypotheca; postea  
 “vero creditor nova syngrapha in corroborationem accepta stipuletur  
 “pecuniam sibi et executoribus solvendam; statim nomen hæreditarium  
 “esse desinit: Licet enim posterior syngrapha sit in corroborationem et  
 “absque præjudicio prioris, ita ut ex utraque syngrapha pecunia debeat  
 “et exigi possit; mutantur tamen nominis qualitates et accidentia extrin-  
 “sica; ex principali siquidem obligatione hæreditarium; ex accessoria mo-  
 “bile est: nec interest debitoris quos sibi velit creditor hæredes aut execu-  
 “tores aut substitutos; adeo ea de re voluntas creditoris ambulatoria est &  
 “novissima derogat præcedentibus.

### Quest. 7ma.

“**C**UM in specie cujus sæpius mentio facta est, *Gaius* substitutus sit  
 “*Sempronio* in syngrapha, in corroborationem data ab hærede tan-  
 “tum unius ex pluribus correis debendi: quomodo agere poterit ad-  
 “versus reliquos debitores nec ex principali nec accessoria obligatione  
 “*Gaio* obligatos?

“*Resp.* Actione utili in factum *Gaium* adversus omnes correos expe-  
 “riri posse (eam *Angli* vocant *Action upon the case*) narrata facti specie  
 “superius exposita: nec minus ut expeditior sit adversus debitores actio  
 “potest etiam agere adversus hæredes *Titij* substituti in prima obligati-  
 “one, ut eam sibi cedant.

### Quest. 8va.

“**C**UM pecunia creditur, & Chirographo *Sempronio* creditori *Titium*  
 “ejusque hæredes & executores substituti sunt; diximus nomen  
 “istud hæreditarium esse: verum sententiæ isti refragari videtur consti-  
 “tutio novella, *Caroli secundi Act* 32, *Parl.* 1. 1661; Ea siquidem statu-  
 “tum

“tum est, omnia nomina ad executores pertinere, nec hæreditaria esse  
 “nisi in casibus ibi exceptis; qui (ut vulgo dicitur) formant regulam in  
 “non exceptis: ij autem sunt tres *viz.* Si obligatione hæredibus tantum con-  
 “sultum sit & disertis verbis arceantur executores: si accedat hypotheca &  
 “investitura, quæ est Ius reale & hæreditarium, nec ad executores pertinet  
 “cum sint hæredes tantum in mobilibus: & si pactum sit de creditore inve-  
 “stiendo ex quo investitura & fasina sequi potest. Idem Ordines prius sta-  
 “tuerant tempore Turbarum & funesti inter Regem & populum dissidii *An-*  
 “*no.* 1641. *Act* 57: quod adhuc extat in Codice apocrypho actorum istius  
 “temporis: Nec iniuste quidem, si materiam spectes, sed frustra & irritum  
 “defectu potestatis legislativæ quæ penes solum Regem est: Is enim solus  
 “fancit, unus fancit pro autoritate, sed prævio Ordinum consilio & con-  
 “sensu: sed,

“*Resp.* Utrobique, tam Regia constitutione, quam illo ordinum statu-  
 “endi conatu, agi tantum de ea nominum specie quæ vulgaris & frequen-  
 “tior est; Cum *sciz.* Ita in creditum itur ut pecunia debeatur, & red-  
 “denda sit creditori ejusque hæredibus & executoribus; quo casu fanci-  
 “tur ea ad executores pertinere: in aliis vero casibus, ubi singularis ali-  
 “qua ratio obest suadetque nomen nec creditorem voluisse nec posse ad  
 “executores pertinere; Lex ista locum non habet: Et cum varii casus  
 “nec de regula nec legis sint, nec de iis cogitatum, eos omnes excipere  
 “nec necesse vix possibile erit: in compertum autem est *Sempronium*  
 “creditorum cum *Titium* ejusque hæredes sibi substituerit, Executores  
 “exclusos voluisse: Et in genere, ubicunque pecunia (ut ita dicam)  
 “talliat; & interciso ordinario succedendi ordine, hæredibus *Tallia*, aut  
 “provisionis prospicitur nomen hæreditarium est; *e. g.* Si quis Chiro-  
 “graphum acceperit sibi & hæredibus forte inter ipsum & uxorem pro-  
 “creatis, quibus deficientibus hæredibus de corpore suo, quibus etiam  
 “deficientibus aliis provisionis hæredibus; nemo ut opinor arbitrabitur  
 “nomen illud, quo consulto tot hæredibus consultitur haud hæreditarium  
 “esse: licet in Chirographo nec de executoribus submovendis nec de  
 “investitura aut fasina danda caveatur.

### Quæst. 9na.

“**Q**Uod superius dictum est substitutum *Sempronio* ei in Jus nominis  
 “succedere & hæredem provisionis esse. Sed de ea re ambigitur,  
 “& *Queritur* an *Sempronio* hæres esse possit, qui eo defuncto e vestigio a-  
 “gere potest adversus debitores ex obligatione etiam sine alia aditione;  
 “licet ex inquisitione quindeceimvirali (ut moris est) haud compertum  
 “& declaratum sit, eum *Sempronio* in ea re hæredem esse: accedit quod  
 “hæres succedit in universum Jus substitutus vero in isto nomine in rem  
 “unam & singularem & forte exilem? *Tenendum* tamen est substitutum  
 “hæredem esse *Sempronio* saltem provisionis: quandocunque enim do-  
 “minium & feodum alicujus rei sive fundi sive nominis est penes aliquem  
 “tempore obitus, ea ad alium transmitti & transire nequit nisi hæres sit:  
 “nec alio Titulo aut Jure succedit substitutus ubi nomen est Chirographa-  
 “rium tantum; quam ubi est etiam Hypothecarium: certum autem est  
 “ubi debitum Hypothecarium est, fasina secuta, substitutum titulo hære-

“dis, nec aliter posse, succedere: imo substituto præmoriens, *Sempronio*  
 “substituti hæres Jus nominis haud nanciscitur nisi *Sempronio* hæres sit;  
 “Et ex Inquisitione constiterit & declaratum sit eam esse hæredem.

Quest. 10.

“**M** Oribus nostris hæres nullum Jus consequitur nisi hæreditatem ade-  
 “at, five ea sit in prædiis five in aliis rebus hæreditariis. In ter-  
 “ris autem duo sunt modi adeundi, ut sciz. a Superiore seu domino di-  
 “recto, vassallo defuncto, hæres agnoscatur & ejus jussu & seu præcepto  
 “(quod *Clare Constat* dicitur) ut hæres investiat: vel ex inquisitione  
 “Judicis ad quem ea res pertinet constet, & ab eo renunciatum sit eum  
 “esse hæredem, & Sasina secuta sit: In aliis vero rebus unicus adeun-  
 “di modus ex inquisitione sciz. Cum igitur in casu superiori, substitutus  
 “nulla prævia Inquisitione secundum obitum *Sempronii*, statim & recte  
 “adversus debitorem agat, haud immerito dubitatur an *Sempronio* hæres  
 “sit? sed,

“*Respondetur*, isto casu additionem haud deesse imo necessariam esse; cum  
 “enim hæreditas aut opulenta aut damnosa sit, ut invito non datur bene-  
 “ficio ita damnum & injuria non debet inferri; nec ullo jure nisi civili  
 “apud Romanos hæres necessarius est, & apud eos unico tantum casu: sub-  
 “stitutus autem ipso facto adit & hæres est, si debitum ut suum petat & ex  
 “Chirographo agat: Ideo autem solenni ex institutione adeundi modo  
 “haud opus est, cum ex Chirographo eum *Sempronio* succedere clare con-  
 “stat, neo in claris ulterius inquirere necesse sit.

Quest. 11ma.

“**U** Bi debitum hypothecarium est & sasina vestitum: substitutus post  
 “obitum creditoris nec recte agit nec aliquid Juris consequitur, nisi  
 “hæreditatem adeat & a domino directe & sponte agnitus & sasitus sit, vel  
 “ex inquisitione Jussu & mandato Regis investitus: *Queritur* igitur quæ  
 “sit ratio discriminis, cum Chirographarius substitutus statim mortuo cre-  
 “ditore & jus habeat & debitum condicere possit; hypothecarius vero non  
 “nisi adita hæreditate nec minus manifestum sit ex obligatione substitutum  
 “succedere?

“*Resp.* Rationem differentie in promptu esse; In Chirographario si-  
 “quidem debito cum Jus personale tantum sit, & ex Chirographo evidens  
 “sit substitutum succedere; ut substitutus adeat nulla alia formula opus  
 “est sed ex Chirographo agendo; vel alio quovis actu Jure suo agnito  
 “adiisse censetur: Sin debitum Hypothecarium sit, cum penes credito-  
 “rem duplex sit Jus, reale sciz. per Sasinam, & personale ex Chirogra-  
 “pho; quod reali (utpote potiori & nobiliori) semper accedit; neutrum  
 “transit ad substitutum nisi adierit & sasitus sit, Sasina a domino volen-  
 “te & sponte data, vel ex Inquisitione & Jussu & Mandato Regis. Cum  
 “igitur ut Chirographarius succedat, unica voluntas substituti ejusque  
 “factum requiratur; In Hypothecario vero tam voluntas & factum sub-  
 “stituti adire volentis quam domini directi eum in vassallum recipientis:  
 “Ideo Chirographarius Jus suum petendo, vel alio actu Jus suum agnos-  
 “cens



“cens, confestim succedit; nec aliud agendum superest: In hypotheca-  
 “rio vero, si dominus directus forte difficilior, substitutum recipere re-  
 “nuit vel cunctatur; Inquisitio necessaria est, ut ex ea rite facta domino  
 “Regi innotescat substitutum, creditori heredem esse; quo comperto,  
 “superior præceptis Regis ex Cancellaria sua morem gerens substitutum  
 “recipit Sasina data: Si vero ter monitus (ut moris est) haud obtem-  
 “perat, in subsidium ex præcepto Regis per Vicecomitem Sasina da-  
 “tur.

### Quæst. 12ma.

“IN specie sæpius repetita, cum Chirographo vel simplice vel hypothe-  
 “cario Pecunia debetur *Sempronio*; & eo deficiente per obitum, *Titio*  
 “ejusque heredibus; si *Titius* præmoriatur *Sempronio* superstite, & postea  
 “mortuo; *Titii* heredes in ea re heredes erunt *Sempronio*; nominis enim  
 “feodum penes *Titium* nunquam fuerat: Ambigitur, an qui *Sempronio*  
 “heres esse vult, etiam *Titio* heres esse debeat actu & aditione; & ut pra-  
 “ctici loquuntur *deservitione*? An vero satis sit eum esse heredem *Titio*  
 “habitu, & qui ei proximior & actu heres esse queat si velit? De ista  
 “Quæstione licet magni momenti, & in praxi & quotidiano usu sæpi-  
 “us recurante, nulla (quod sciam) decisio est; adeo ut mihi inte-  
 “grum sit dicere quod sentiam, salvo eorum Judicio, penes quos vel  
 “legis vel sententiæ ferendæ autoritas erit. Cum igitur pro utraque  
 “parte haud desint rationes, nec ex leves; in isto conflictu  
 “hæc animum fluctuantem impulsere ut pedibus in illam sen-  
 “tentiam eam; requiri sciz. ut qui *Sempronio* heres esse vult etiam  
 “*Titio* heres sit habitu & proximior; nec necesse esse ut ei Heres sit actu  
 “& adeat: In omnibus dispositionibus mens & voluntas disponentium  
 “attenditur, in iis autem dominatur quæ *Voluntates* dicuntur institutio-  
 “nibus sciz. & substitutionibus heredum; quæ nedum in Testamentis  
 “sed inter vivos fiunt, sapiunt tamen naturam Testamenti vel donationis  
 “mortis causa. Cum autem quis heredes Talliæ aut provisionis (ut loqui-  
 “mur) instituit, id unice vult fatagique ut in rebus suis heredes instituat:  
 “non vero ut aliis & in aliorum rebus vel instituat vel substituatur heredes.  
 “Et substitutio pupillaris qua pupillo, & exemplaris (ad pupillaris exem-  
 “plum) qua furioso heres datur, singularia sunt Juris antiqui & municipa-  
 “lis Romanorum, nec alibi usurpata: Quando igitur *Sempronius* vel alius  
 “quilibet, *Titium* ejusque heredes sibi heredes aut Talliæ aut provisionis  
 “substituit, ratio haud habetur civilis adeundi actus, sed Juris adeundi &  
 “sanguinis; ut qui ut alterius heres ad successionem vocatur, eatenus alteri  
 “uni forte ex liberis aut cognato suo ea necessitudine junctus sit, ut alteri  
 “heres esse possit si velit & e re sua sit; si enim adeunti vel exigua spes lu-  
 “celli affulgeat, quod aditurus sit haud dubitandum; sin alterius heredit-  
 “as damnosa sit, nec instituentis nec hereditatis ejus interest ut ei necesse  
 “sit alienam adire; quæ nedum inanis sed etiam damnosa suam exinani-  
 “ret quantum libet pinguem & opimam: Ut de vaccis proditum est per  
 “somnia a *Pharaone* visis adhuc deformibus & strigosis, etiam pinguibus  
 “& nitidis devoratis: Nec aliquid a ratione vel Jure magis alienum est,  
 “quam ut quod in favorem introductum est in odium & perniciem retor-  
 “queatur. Adhæc in materia hereditaria, tam in Jure quam praxi & usu  
 “&

“ & stylo, apud nos vocabulum *hæres* non pro eo qui adiit hæreditatem sed  
 “ pro adituro vel cui adeundi jus est sæpius accipitur; hæreditas siquidem  
 “ est jus successionis; & de adeunda (secundum doctores) magis proprie  
 “ quam de adita dicitur: ubi enim adita est & successum, definit esse  
 “ hæreditas & jus succedendi: hinc est quod ubi per *Breve de morte ante-*  
 “ *cessoris* mandatur Judici idoneo ut inquiri faciat, quis defuncto sit legiti-  
 “ mus hæres, intelligitur hæres habitu & cui Jus sit succedendi; non vero  
 “ hæres actu & qui adiit; de quo cum jam adierit supervacanea esset tam  
 “ inquisitio quam aditio.

“ Id in ista specie facti luce clarius est, si quis enim liberis orbus, fratres  
 “ habeat; & inter eos, qui sibi hæres futurus esset, virum prodigum &  
 “ & obæratum; & consulto eo præterito substituit ejus hæredes: ut reor,  
 “ nemo opinabitur eum voluisse ut sui hæredes prodigo & decoctori actu  
 “ hæredes sint: Et quod una via solícite curaverat ne fieret fratre præterito,  
 “ fortunarum suarum naufragium & jacturam voluisse fieri alia via fratris  
 “ hæredibus institutis, si hæredes nedum habitu sed actu esse debeant:  
 “ Imo aliquando, cum quis alterius hæredes sibi adsciscit & substituit, eve-  
 “ nire potest ut instituenti hæredes sint, alteri vero vix habitu hæredes esse  
 “ possunt; si necessitudo & jus sanguinis haud desit oblit vero civilis aliqua  
 “ ratio; ut *v. g.* fratris hæredibus institutis, si præmoriatur instituens  
 “ fratre adhuc superstite, qui ei hæres fuisset si eo quo instituens diem obiit  
 “ tempore decessisset; instituenti hæres erit, nec fratris mors operienda erit,  
 “ & tamen ei hæres nec habitu esse potest qui instituenti succedit; Ea ra-  
 “ tione obstante quod adhuc superstes hæredem habere nequit, vel si fra-  
 “ tris hæreditas integra & ex asse adita sit, adeo ut amplius hæredem habere  
 “ nequeat, facultate adeundi per aditionem absumpta; quia si frater cu-  
 “ jus hæredes vocantur præmortuus sit sine liberis & perduellionis damna-  
 “ tus, instituentem postea defuncto; si alius sit frater qui perduelli hæres  
 “ foret si ad pacem & fidem Domini Regis decessisset, & instituenti hæres  
 “ erit licet neutro casu fratri nec habitu nec actu hæres esse posset; obstan-  
 “ te *sciz.* non naturali ratione & sanguinis defectu, sed Jure & ratione  
 “ civili, ob eas quas supra memoravimus causas.

“ Quæ pro altera parte afferuntur, *viz.* quod ei quorundam sive opi-  
 “ nio sive error (& magis communis) suffragetur; & vulgo dicitur *error*  
 “ *communis jus faciat*, hisce præsertim rationibus subnixus, *viz.*) cum quis  
 “ vocatur sub modo aut qualitate ut alteri hæres sit qualitatem nedum adesse  
 “ sed præambulam antecedere oportere, nec instituenti hæredem esse  
 “ posse nisi prius alteri cujus hæredes vocati sunt hæres sit: cumque *Hæres*  
 “ nomen Juris sit non personæ, alterius hæredem non admittendum esse,  
 “ nisi ex Inquisitione alteri hæredem esse compertum sit; ex In-  
 “ quisi-tione autem alterius hæredem renunciari moribus nostris  
 “ nihil aliud esse, quam alterius hæreditatem cernere, & actu adire.  
 “ Istæ inquam rationes facile diluuntur; nam cum patribus errasse utcum-  
 “ que excusat, errore autem ratione evicto & agnito, nemo adhuc erran-  
 “ dum esse sentiet: Et communis error quando est *in facto*, & circa con-  
 “ ditionem aut qualitatem personæ, ut quondam *Barbarii Philippi*; qui  
 “ cum servus esset prætor Romanus fuit; in isto & similibus casibus, vel  
 “ si forte prælatus vel notarius haud legitimus pro legitimo tamen tentus  
 “ & reputatus sit, hactenus communis error Jus facit ut quæ ab iis gesta  
 “ sunt.

“sunt haud corrumpant, publica utilitate postulante; ne publicus & communis error Reipublicæ noceat: Error autem in Jure non excusat nedum  
 “Jus facit; & qualitas sub qua vocatur hæres alterius, haud deest si hæres sit habitu & proximus, ut superius demonstratum est. Denique  
 “qui Brevi Regis impetrato postulat ut judex inquiri faciat an hæres sit  
 “instituenti, ejusque tantum hæreditatem adit, licet alteri hæres sanguinis & habitu & esse & per inquisitores renunciari debeat.

### Quæst. 13.

“AN eo ipso quod *Sempronii* hæreditatem adiret *Titii* hæres; etiam  
 “*Titii* hæreditatem adiisse videatur, cum *Titii* hæres *Sempronio*  
 “substituti sint; adeo ut provisionis hæres *Sempronio* esse nequeat nisi  
 “hæres *Titii* sit quarendum est? parum quidem interesse videtur utrum  
 “*Titio* hæres esse ex inquisitione, & postea *Sempronio* ex alia inquisitione  
 “etiam hæres esse comperiatur; an vero ex una & eadem Inquisitione tam  
 “*Titio* quam *Sempronio* eum hæredem esse declaratur. Cæterum voluntas  
 “& propositum (nedum maleficia sed &) Civiles actus distinguit; cum  
 “itaque *Titii* hæres Brevi ex Cancellaria impetrato inquiri postulat an sit  
 “*Titio* hæres, sine dubio *Titii* hæreditatem adit; Id enim unice agit &  
 “vult, ut *Titio* actu hæres sit: Verum ubi Brevi impetrato de morte ante-  
 “cessoris inquirendum curat quis *Sempronio* hæres sit, & clameo seu peti-  
 “tione exhibita petit ut declaratur se hæredem esse *Sempronio* cum hæres  
 “proximus *Titii* sit, eo casu nec adit nec ei propositum est ullam nisi  
 “*Sempronii* hæreditatem adeundi: An vero *Titii* sit hæres inquiritur  
 “tantum obiter & tanquam de qualitate præambula; sine qua *Sempronio*  
 “provisionis hæres esse non potest; non vero ut *Titii* hæreditatem adeat,  
 “& ei hæres actu sit: sufficit enim ut superius disseruimus ut *Titio* hæres sit  
 “sanguinis & habitu: adeo in Jure iidem actus ex animo & fine diverso  
 “plerumque diversos habent & sortiuntur effectus.

### Quæst. 14.

“Nihil quidem a Religione Judicantis magis alienum est quam  
 “*ἀναισθησία* ea divino & omni Jure vetita ægre tamen vita-  
 “tur; & quod de *Marte* & *Venere* & de *Vulcani* vinculis occultis sed te-  
 “nacibus in fabulis est, verum est de Affectibus animum impredientibus,  
 “ne Verum & Justum cernere possit: imo ubi Lex & regula haud deest,  
 “interdum instar *Lesbia*, colore aliquo eò torquetur, quò affectus impellit:  
 “ubi autem Lex aut regula deest, sibi homines Lex sunt ut ait Apostolus,  
 “sensu multum diverso: & Judicantis pro lege affectui gratificandi arbi-  
 “trium sibi permissum arbitrantur. Curandum itaque quantum fieri po-  
 “test, ne arbitrio, Legibus & Justitiæ in viso, locus sit. Licet autem sit  
 “homonomia in ipso nomine *Hæredis*, & materia anceps & arbitraria; u-  
 “trum hæres de eo qui est actu hæres, an de eo qui habitu & sanguinis hæ-  
 “res est tantum, intelligendum sit: Arbitrium tamen videretur istis regu-  
 “lis substrungi & coerceri posse.

imo. “Ubicumque alterius hæres ad alterius hæreditatem vocatur satis  
 R “est



"est eum alteri hæredem esse habitu; utque ei facultas & jus sit adeundi si velit & profit, non vero necessitas si nolit aut noceat.

2do. "Tum materia subiecta tum id quod agitur multum inspicitur: "In materia igitur non successoria, ubi mentio fit hæredis, nec agitur ut succedat sed ad alium finem & effectum, intelligendus est semper hæres habitu non actu; e. g. In tabulis nuptialibus seu Contractu quem matrimoniale dicimus, synalagma est & mutua ultro citroque obligatio; sponso enim de dote; sponsæ de doario cavetur; & liberis de successione: quia vero obligatio sine actione & executione inanis esset, nec uxor nec liberi sub potestate & ferula mariti futuri, contra eum agere queunt; ideo clausula executiva introducta est, qua cavetur; ut actio & executio comperat Necessariis quibusdam & eorum hæredibus, ad ea perfequenda quæ uxori & liberis ex eo contractu debentur aut præstanda sunt: Eo casu si aliquis ex hæredibus egerit, ex ea clausula qua sibi non consulitur sed ob sanguinis & necessitudinis vinculum in aliorum rem officium & sollicitudo injungitur; nemo rationis compos nedum Jurisprudens opinabitur, eum summovendum nisi actu hæres esse velit; & hæreditati damnosæ se implicare non obstante Juris regula *officium nemini debere esse damnosum*. Haud aliter sentiendum eo casu quo decimæ (ut plerumque fieri solebat) ad longum tempus locantur, conductori ejusque hæredibus & assignatis; ita ut locatio durante vita conductoris, & secundum eum trium hæredum successive duratura & æquæva sit. Hæredes enim, cum quæritur quamdiu locatio duratura sit, intelliguntur qui sanguinis & habitu hæredes sunt, licet non actu; si enim (ut sæpe evenit) locationis Jus cessum fuerit nec ad hæredem pertineat, haud credendum tres hæredes, Jure alienato, in aliorum rem alienanti hæredes fore actu, & adituros: Cumque locatio sit conductori hæredibus & assignatis, durante tot hæredum vita, non agitur ut penes hæredes Jus istud semper futurum sit, sed ut siue sit penes hæredes siue singulares successores, ut ejus duratio, cum ex natura locationis perpetua esse nequeat, definiatur ex vita trium hæredum.

"Sic in judiciis declaratoriis Juris, Non introitus forte aut aliis ejusmodi & Rescissoriis, quia non sunt actiones rei persecutoriæ, nec iis aliquid dari vel fieri petitur sed agentis jus tantum asseritur & declaratur; necesse tamen est ut omnes quorum interest conveniantur; defunctis iis quorum interesse poterat hæredes eorum necessario citandi sunt; nec necesse tamen est ut sint hæredes, actu & vel adeant vel repudiant.

3tio. "Ubique hæredibus sanguinis consulitur, cavetur tamen ne actu hæredes sint; ne adeundo litibus aut debitis hæreditariè subjaceant: Æquivocum hæredis nomen de eo qui proximus & habitu hæres sit intelligendum est, exemplum fuit insigne in ea cujus superius meminimus facti specie, cum *sciz.* Frater adhuc liberis orbus, fratre parum frugi aut prodigo; ideo eo præterito fratris hæredes resignatione facta sibi si non agnoscantur liberi hæredes substituit; veritus ne si frater succederet etiam sua profunderet.

"Illud quoque addi potest, quod instrumentis sponfalitiis cum vir ad secunda vota convolat, sapius hæredibus prospicitur; ut a sponso terræ & prædia dentur vel acquirantur, aut ut certa pecuniæ summa collocetur sub usuris; & terrarum aut ex iis annui redditus hypotheca; sed ea  
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“lege ut penes Conjuges usufructus tantum sit, hæredes vero ex conjugio feudum & proprietas; ut superiore ita isto casu liquet id agi, ne hæredes patri succedant cum ex priore matrimonio liberos forte habeat ei hæredes in universum futuros: liberi vero ex secundo matrimonio in Terrarum aut annui redditus feudum ex pacto ipsis concessum succedere nequeant, cum penes patrem haud futurum sit: Ea igitur interpretatio fieri debet ut id quod agitur & actus valeat, & evitetur absurdum; maximum autem foret si quod una via prohibetur aut caveretur alia eveniat: & dum *Charybdis* evitatur, incurratur *Scylla* non minus exitiosa.

### Quæst. 15.

“Superius Respondimus *Titium* ejusque hæredes, *Sempronio* in Chirographo substitutos, ei hæredes esse provisionis: *Quærendum* an *Sempronii* Creditoribus teneantur? & quidem dicendum est eos teneri & obnoxios esse; nam omnis hæreditas etiam particularis, & in Chirographo prædio aut alia re particulari, eatenus est successio in universum Jus; secundum hæreditatis definitionem: ut nedum commoda sed incommoda & onera ad eum pertineant & redundant, sed quatenus debitis subjaceat & oneribus: quæstio difficilior nec levis momenti est, & alio forte loco ubi de hæredibus *Tallia* & provisionis & aliis particularibus hæredibus agetur, magis opportune ventilabitur.

### Feus.

IF a Feuer may Refute as in the case of other holdings? The difference being, that *Feuda* are *Beneficia*, & invito *Beneficium* nec datur nec restituitur: Whereas *Feus* are *Emphyteuses* and upon the matter perpetual Locations; and as in *Locationibus* either *ad tempus* how long so ever, the Conductor cannot renounce, so their appears to be *eadem Ratio* in *Feus*.

Whether there be Non-entry in *Feus*, and the Liferent *Escheat* of the Feuer doth belong to the Superior, seing they are not *proprie Feuda*? And yet it is thought *sapiunt naturam Feudi*.

If there be Non-entry: Whether before Declarator, the Superior will have right to the retoured Duty, which is the Feu-duty, besides the Feu-duty due to himself: And after Declarator to the full profits?

### Feuda Nobilia.

*Feuda nobilia sine Nobilitate dari possunt: Adeo ut aliquis ab Imperatore investiiri posset in Ducatu aut Comitatu, nec tamen Dux aut Comes sit.* Thes. Befold. in litera I. 18. verbo. Innhabern. def. p. 428.

### Fiar.

1. WHEN Lands are Disposed to a person, without mention either of Heirs or that he is Fiar or Liferenter; or that they are Disposed Heretably. *Quæritur*, If he be Fiar?

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2. In Conjunct Fee where there are no degrees of Substitution, whether is the Husband or Wife Fiar?
3. When Lands are given in Conjunct-Fee to the Husband and Wife, and their Heirs; who is Fiar?
4. If the Husband be Fiar, whether at least the Heirs betwixt him and her, are to be understood his Heirs: or his Heirs whatsoever?
5. If Lands be Disposed to two Brothers by their Father, and their Heirs; if they be both Fiar *ex semisse*?
6. If when Lands are Disposed by a Father to two Brothers and the Heirs of their Body; if one die without Heirs of his Body, whether it be *Substitutio reciproca*?
7. When Lands are Disposed to Husband and Wife and their Heirs of the Marriage; and these failzieing the half to the Husbands Heirs, and the other half to the Wives: *Quaritur*, Whether the Husband be so Fiar, that the Wives Heirs, failzieing Heirs of the Marriage, will be Heirs of Provision as to the half?
8. When it is intended that the Wife should be a Joynt-fiar: If the Right should not be to the Husband and her; and after their Decease the half to his Heirs and the other half to her Heirs?
9. When a right is given to Two Persons and to the longest Liver of them Two, and the Heirs of the longest Liver, who is Fiar? And if the Fee be *in pendent*?
10. When the Fee is provided by Contract of Marriage to Bairns; and accordingly a Right is granted in the foresaid terms, there being no Bairns for the time: *Quaritur*, When a Child is born whether the Fee be immediatly in its person?
11. If it be *in solidum* in its person and thereafter others be born *Quaritur*, *Quid juris*, and if *concursum faciunt partes*?
12. In Conjunct-fees where there is no substitution, the Heirs determine the Fee.
13. Where there are degrees of substitution, The person whose Heirs succeed first is Fiar; And all the Substitutes thereafter are Heirs of Provision to the Fiar by progress.
14. When a Band is taken to a person and his Heirs; if his Grand-child by a Daughter decease having no issue, whether the Child being Heir, his Father will succeed to him; albeit his Father cannot be Heir to the Grand-father, and *hares haredis* should be *hares instituentis*?

### *Fiars of Bonds*

A Bond being in these terms, To a man and his Wife and the Heirs of the Marriage; which failzieing to the longest Liver of them two and the Heirs of the survivor, *Quaritur*, who is the Fiar?

A Bond being granted to a Husband and his Wife and the longest liver of them two in Conjunctfee; and to one of their Sones expressly named and the Heirs of his Body: whilks failzieing to the Heirs to be procreat betwixt the Husband and the Wife; whilk failzieing to the Wives Heirs and Assignes, *Quaritur*, Whether the Fee of the said Sum pertaineth to the Husband, or to the foresaid Son, or to the Wife? *Ratio Dubitandi*, That the Right of succession



Succession terminates upon the Wife and her Heirs, which seems to import that she is Fiar <sup>2do</sup>. As to the Son the said Sum being provided to his Heirs in the first place It seemeth that the Fee should pertain to him: Seing the Heirs of his Body are to succeed in the first place, and the Fee of Money (as it is said of the *Usufructus* of Money, That it is *quasi Usufructus*) is *quasi feodum & Proprietas*: and properly that is said to be *Property* which belongeth to a person and descendeth to his Heirs: And yet it is thought that the Fee of the said Sum doth belong to the Husband, in respect the Money being his own was lent by him in behalf of himself and the foresaid persons: and albeit when a Bond is conceived simply to a Husband and his Wife in Conjunct-fee and to her Heirs and assigneys, she is Fiar; for the reason foresaid, that it is to belong to her and her Heirs only. Nevertheless when there is diverse degrees of Substitution of Heirs of diverse persones and of a Wife in the last place, the person whose Heirs are provided for in the first place ought to be understood to be Fiar: and these in *secundis tabulis* and in a more remote degree, to be only Heirs of Provision Failzieing the former: and if the Son had survived or his Heirs, It is absurd that they should be Heirs to their Mother and not to their Father; And that the Mother being Fiar should have power to Dispose of the Sum in prejudice of her Husbonds Children. And albeit the said Sons Heirs be first named yet it is thought that he is not Fiar, seing he is to be Heir of Provision to his Father: as if an Infeftment were granted to his Father and Wife in Conjunct-fee; and failzieing of them be decease, to a certain person their Son and the Heirs of his Body: The Son in that case would be Heir of Provision.

A Bond being granted to a Man and his Wife and longest Liver of them Two and their Heirs: And the Wife having survived, *Quaritur*. If she will be Fiar of the said Bond?

A Person having Infeft his Creditors for security of Debts, and while they be payed respectively. *Quaritur, Quatenus* They are Fiars whether *in solidum*, or *ex parte*: And *qua parte*? *Respondetur*, They are Fiars proportionally, and *ex parte* effeiring to their Debt.

### *Fiars in Tailzies.*

**B**Y a Contract of Marriage; Lands being given in Tocher and the Right thereof so conceived that they were Disposed to the Husband and the Gentlewoman in Conjunct-fee and Liferent, and to the Heirs of the Marriage: Whilk Failzieing to the Heirs of the Husband his Body in any other Marriage: Whilk Failzieing to the Womans Heirs and Assigneys whatsomever. *Quaritur*, who is Fiar? *Answer*. That though where there is but one degree of Substitution, (*viz.* Failzieing the Heirs of the Marriage the Womans Heirs) The Woman is Fiar; Because *res pertinet ad eos quorum heredibus providetur*: But where there are diverse Degrees of Substitution (as in this case) the Husband (*cujus heredibus maxime prospicitur*) It is thought should be Fiar; Seing not only the Heirs of the Marriage gotten by him, But in the next degree his Heirs of any other Marriage are substitute: and in *ultimis tabulis*, The Wifes Heirs, and as Heirs of Provision to the Husband: and the Husband having given a Jointure, it is

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thought to be in Lieu of the Tocher, and to belong to him as Fiar and not as simple Iiferenter.

A Bond for a Sum of Money being granted to a Man and his Wife and longest Liver of them Two, and to their Heirs and Assignes secluding Executors: And the Wife having survived the Husband, and a Bairn being likewise on Life of their Marriage: *Quaritur*, Whether the Relict will be Fiar?

If a Bond be granted to Two Brothers in the terms foresaid, and one of them deceasing having left Children, and the other surviving having also Children: *Quaritur*, who is Fiar?

### *Fictio Juris.*

*Quaritur*, A Debitor being diseas'd what way can the Compriser be Infeft? *Answer*. The Decreet of Reduction putteth the Debitor quoad the Creditor in the same case as if he had not been denuded *Fictione Juris*.

### *Fiscus.*

*IN Dubiis ubi non est plena Probatio fisco non favendum.* Besol. Thesaur. liter. L. p. 556. vide Auctores ibi citatos.

### *Commissa Fisco.*

*Merces committuntur Fisco ex causa fraudati vectigalis ipso Jure; ita ut statim desinant esse ejus qui deliquit: ita tamen ut ob contradictionem partis requiratur sententia declarativa.* De Jure fluminum. 206.

### *Flumina.*

*Flumina a Rivis distinguuntur magnitudine, vel aestimatione circumcolentium* Hering. de molendin. Quæst. 15. n. 4.

### *Flumina Publica.*

*Flumen publicum est illud quod perenne est.* Th. Scipman. de Jure Fluminum seu. jus Fluviatricum p. 3. n. 20.

*Flumina publica sunt in potestate & patrimonio Principis, & de Regalibus sunt,* idem P. 5. n. 52.

*Publica sunt superiorem non recognoscentis, & Majestate fulgentis,* Ibid n. 7. & quorum usus omnibus Expositus est.

*Flumina publica sunt, quæ sunt perennia & de Regalibus, plerumque navigabilia, & quæ navigabile aliud faciunt, & ad principem pertinent: Usu vero patent singulorum commodis & utilitati, non etiam commercio seu Juri emendi, acquirendi, alienandi.* Quæst. eadem. Num. 10.

*Flumina Censitorum vice funguntur, & ex privato in publicum adducunt, & ex publico in privatum, dum uni adimant & alteri addunt,* Jus fluviat. p. 5. 24. &c.

## Forfeiture.

A Subvassal being Forfeited, Whether His Majesties Donator will have Right to the Estate free of Servitudes, and Rights not consented to by the immediat Superior? *Caldwells Relict contra Dalziel.*

When the Lands fall in His Majesties Hands by Forefeiture, or otherways by the suppressing of Benefices, or any other occasion; if there be Vassals holding of the same; May he Dispose the saids Lands and Superiorities? *Ratio Dubitandi*; That a Superior cannot interpose. *Answer.* There is a difference betwixt Vassals holding Originally of His Majesty, and these who hold *ab initio* of other Superiors: As to the first they cannot be prejudged so as to be put to hold of any other than His Majesty, and to be more remote from the Fountain: The others are not prejudged, seeing they are put in the condition they were in formerly: and as the former Superior might have Disposed the Superiority, and resigned; so His Majesty cannot be denied the same Power: and His Majesties Disposition is *Fictioe Juris* equivalent to a Resignation, seeing there is no other Superior in whose hands the King can resign.

If a Subvassal, to a Vassal holding of the King, be Forefeited for Treason; will subaltern Rights granted by him fall under Forefeiture? Seeing it is pretended that such Forefeitures belong to the King not as Superior but *Jure Coronæ* and as Prince; & *noxa caput sequitur*: and the King has no prejudice having a Vassal. Yet I think that these Rights should fall, *Quia resolutio Jure Dantis resolvitur Jus accipientis*: And if the Subvassal should Forefeit his Lands by Recognition, his Vassals Right would Forefeit: And it is against reason, That Treason being *Crimen gravius*, The Forefeiture and *pæna* should be *Levior*: And Treason is *Crimen feudale* and against the King as Superior paramount: and as the betraying of a mediate Superior will import Forefeiture, not only of the Subvassal but of his Vassals; there is the same or greater reason, that Treason against the King should have the same effect: and the reason that the Forefeiture of the Subvassal should belong to the King is, because the Crime is committed against him as highest Superior.

If the Kings immediat Vassal should confirm the Inferior Rights, if there be any alteration of the case? Seeing the King is in place of the Vassal, because the Crime is committed against the King as Superior, and he should be in no better case: and the Vassal if he were to have the benefit of the Forefeiture, could not Question the said Rights.

If a person Infeft in Liferent be Forefeited for Treason, will the Liferent expire though he survive? Seeing he is *nullus*, and after Treason doth neither transmit *cedendo* nor *delinquendo*.

A Person being Infeft in Trust and to the use and behoof of another; *Quæritur*, If he commit Treason will he Forefeit the Right of the Lands to His Majesty? Seeing albeit his Right be to the use and behoof of another yet he is Vassal; and as the *French* say he is *homme vivant & conquisquant*; and there is no reason the Superior should be defrauded; and the granter of the Right is to be blamed that he trusted such a person.

By the *English* Law, though a person Dispose for Onerous Causes, he is not Lyable to warrand unless he be expressly bound; otherways the



acquirer is presumed to take his hazard: But with us no Warrandice, is absolute Warrandice.

*Quæritur*, If a Donator to a Forefaulture has Action for Exhibition and delivery of the Evidents?

The Vassal of a Subject, having granted a subaltern Right to be holden base, and the same not being confirmed by the mediate Superior: *Quæritur*, Whether the Subvassals Right forefaid, will fall under the Forefaulture of his immediat Superior being Forefaulted? *Answer*. It is thought that it will fall under the Forefaulture, in respect that if the person Forefaulted had committed a Crime against his Immediate Superior whereupon the Lands would have recognosced or Forefaulted to him, The Subvassal his Property would have fallen under the Forefaulture; and there is *eadem* if not *major Ratio* in the case of Treason, The King being Superior Paramount, and the Crime against him being also a Crime against the mediate Superior; there being no greater wrong than to be a Traitor to the Superiour. *Caldwell and Glanderstoun*.

*Quæritur, Quid Juris*, If the mediate Superiour had confirmed the Subvassals Right?

*Quid Juris* in the case of Forefaulture for Treason? And if there be a difference in the case of Forefaulture in Parliament and before the Justices?

Lands being Compyrised and a signature being past upon the Compyrising, but no Infesment being taken thereupon: *Quæritur*, If the Debitor commit Treason in the *interim*, whether the same will fall under Forefaulture? *Answer*. It is thought that it will not, seing the Debitor was fully denuded; there being no vestige of Right in his person; seing he is divested by the Compyrising as if he had resigned, and the Superiour had accepted the Resignation.

*Quæritur, Quid Juris*, If there were only a Compyrising without a Signature? And the Question may be more general; *Viz*. If in all cases the Heretor be so denuded that he cannot prejudge the Compyrser, by any Deed whereupon Recognition or other Forefaulture may follow, in favours of the Superiour: otherways a Malicious Debitor may, of purpose, do such a Deed to prejudice his Creditor.

To consider if there be a difference betwixt a Disposition and Resignation accepted by the Superiour: And a Compyrising; whereupon nothing has followed?

*Item*. If the presenting of a Signature on a Compyrising to the Exchequer, be equivalent to a Resignation in the Superiours hands and accepting?

*Item*. Whether a Charge to other Superiours to enter the Compyrser be equivalent to a Resignation?

If after a Person is Forefaulted, an Estate should fall to him, as appearand Heir to any person, he being yet on Life; whether would the same pertain to the King or to the next Heir, as if he were Deceased? Seing he is *nullus* being Forefaulted, and is not in a Capacity to be Appearand Heir.

If a Forfaulted person have Children that are *ante nati*; Whether or not will they be prejudged by their Fathers Forfaulture: as to any Capacity or Estate belonging to him? Whether will they succeed to their Grandfather

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or any relation upon the Fathers side; Seing their Blood is corrupted and they cannot represent their Father being *nullus* as said is?

A person having Married an Heretrix, and being thereafter Forfaulted, *Quæritur*, If the Blood of the Children be so tainted and corrupted That they cannot succeed to their Mother? *2do*. If the Mother should not dispoñe in her own Lifetime; Whether her Estate will fall to the King by the incapacity of the Children, being her appeirand Heirs?

An Heretrix being Wife to a forfaulted person, If als long as he liveth the King will have right to the Mails and Duties *Jure Mariti*? *2do* If she may dispoñe of her Estate without his Consent seing he is *nullus* in Law: And yet is her Husband, the Marriage not being dissolved with the Forefaulture?

A Father having Dispoñed his Estate to his Son, with Reversion and power either to Redeem or Dispoñe; *Quæritur*, If the personal faculty may, notwithstanding, be comprysed during the Fathers Life; and may be used even after the Death of the Father? There is the same Question as to Forefaulture.

A Woman being Heretrix of Lands in Scotland; and the same being Tailzied to the Heirs of her Body, whilk Failzieing to certain other Heirs: with the ordinary Clausēs irritant that she and they should not have power to prejudice the Tailzie; *Quæritur*. If her Husband being Forefaulted, the Blood be so corrupted that her Children cannot succeed, and if their Interest of Succession will fall to the King?

If a Tack set for an Onerous Cause and for payment of Debt; will prejudice the Donator to the Forefaulture?

The Creditor having an Action of Reduction competent to him for Reducing an Infeftment as being in defraud of him; if thereafter the Debitor should be Forefaulted, and the Creditor reduce the said Right; what way shall he be Infeft; seing he cannot Compryse or Adjudge; the Debitor being Forefaulted?

There being a Minute of Contract anent the selling of Lands, and the Buyer being thereafter Forefaulted; *Quæritur*, If the King or his Donators will have Right to the said Minute in the same manner as the Buyer? or if the Seller can raise a Declarator to be free of the Minute? Seing albeit where there is a clear Right and Interest belonging to a person Forefaulted, the same will pertain to the King; yet when a Bargain is only *in fieri*, and there are diverse obligations upon the part of the Forefaulted person, the Seller ought not to be in worse case, and in place of a Subject have so powerful an Adversary. *The Earl of Tarras, and the Heirs of Walter Riddel.*

The Laird of Cefnock having acquired from Castlemaines the Barony of Castlemaines, but not being Infeft but base before the Forefaulture, *Quæritur*, If by his Forefaulture, these who had Rights holden of Castlemaines not confirmed by the King will be in any hazard? *Answer*. It is thought not: Seing any Right Cefnock had to the saids Lands, was not as the Kings Vassal: In which case the subaltern Rights would have fallen; and Castlemaines remaining the Kings Vassal, Cefnock had only the Right of property holden of Castlemaines: And as to Castlemaines Right holden of the King, Cefnock had only *Jus ad rem* by the Contract or Disposition; so that thereby the King by the Forefaulture may come to Castlemaines

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Right, and force him to denude himself of the same; but it cannot be said that the said Estate came in the Kings hand by the Forefaulture of a Vassal.

*Sempronia* having Right to certain Lands which are parcels of a Barony Feued to her Authors by the *Earles of Argyle* who held the same Feu of the *Arch-Bishops of St. Andrews*; who did confirm the subaltern Rights granted by the saids *Earles*: *Quaritur*, Whether the saids Lands belonging to the said *Sempronia* do fall under the Forefaulture of the *Earl of Argyle*, notwithstanding the confirmation granted by the Bishops: In respect the saids Rights are not confirmed by the King?

In Answer to the said *Querie*, *It is thought*, that the saids Lands do not fall under the *Earles* Forefaulture, for these Reasons.

1<sup>mo</sup>. The *Earle of Argyle* did Forefault only what did belong to himself, *Nam noxa caput sequitur*; and the saids Lands did not belong to him in Property, but only in Superiority: And there is a difference betwixt the said case, and the case of Lands holden immediatly of the King himself; which by the Forefaulture of his Vassal are Forefaulted; and does return to the King as he did give them pure and free, and without the burden of any other Right granted by the person Forefault, but such as the King did consent to and confirmed: Whereas in the case in Question, The said *Earl* did not hold the forefaids Lands immediatly of the King but of the *Arch-Bishop*, who stands still His Majesties Vassal: And as his own Right is not prejudged by the said Forefaulture, so the Right of the sub-Vassal consented to and confirmed by him, is not prejudged by the said Forefaulture.

2<sup>do</sup>. Lands holden of the *Bishop* waird, or which would fall in his hands upon Recognition or otherways by the deed of the *Earl of Argyle*, being Disposed by the *Earl* to be holden of himself; will not recognise by the *Earles* Deed in Disponing the Superiority or otherways, if the *Bishop* had confirmed the Subvassals Right; And there is the same reason in the case of Forefaulture, in respect by the common Law when Lands do fall and are confiscat, they fall to the immediate Superiour: And by our custom in the case of Treason the King has that Priviledge, that the Lands which are Forefault are Confiscat and Forefaulted to him; because the Crime is committed against him. And therefore the Lands holden of other Superiours do Forefault to the King, no otherways than they would belong to other Superiours, if the Forefaulture did belong to them; In which case the confirmation of the Subaltern Rights by the immediate Superiour of the person Forefaulted, would save the Subaltern Rights that they could not fall under Forefaulture.

3<sup>tio</sup>. By the Law and Custom of the Kingdom it is lawful *Subinfeodare*; and albeit it may be pretended that if the *Bishop* had not confirmed the Fews granted by the *Earl of Argyle* they would have fallen by his Forefaulture though lawful *ab initio*, seing *res devenit ad aliam causam & resolutio Jure dantis resolvitur jus accipientis*: Yet in the case of confirmation by the *Bishop*, there is a great difference; seing the Subaltern Right doth not only depend upon *Argyl's* Right so that it falleth with it; but has another Foundation whereupon it does subsist; *Viz.* The *Bishop's* own Right and the confirmation granted by the *Bishop*; and specially in this case, seing it appears by the confirmation that the same is granted not to gratify the Subvassal



vassal, and to prevent prejudice to him by the Forefaulture of *Argyle* if it should fall out, but in order to the *Bishop's* own Interest and Advantage; In respect by the confirmation there is reserved to the *Bishop*, beside the Feu-duty payable to *Argyle*, a Feu-duty to himself and his Successors; with a Clause irritant if it be not payed: And *fictione brevis manus*, the Feuar is in the same case as if the *Bishop* *ab initio* by one Charter had Disposed the saids Lands to the *Earl of Argyle* in Superiority, and to the Feuar in property for payment to the *Earl of Argyle* of the Feu-duty mentioned in Charter, and to the *Bishop* the said other Deuty: In which case *Argyl's* Forefaulture could not prejudice the Feuar of the Right of Property granted by the *Bishop* himself, nor the *Bishop* of the said Additional Duty.

410. By the *Acts of Parliament* K. Ja. 2d. and K. J. 4. anent the setting of Fewes and by custom ever since, The setting of Fewes was so speedful and necessary in order to the policy of the Kingdom; That Vassals are not only allowed but invited to set their Lands in Feu; which in effect is a general confirmation of all Fewes; so that the Fewers should not be in hazard either by the Waird or Non-entry or by any Deed or delict of their Superiour; but should be liable only to pay their Feu-duties to these who should have Right upon occasion of the same: and the said Barony being of a large and vast bounds, albeit it was Fewed to the *Earl of Argyle*; yet for the labouring and bringing it in, it was necessary to set it in parcells to other Fewers holden of him: and the Fewes in Question are granted before the Year 1606.

A Subvassal holding of a person Forefaulted, and his Right not being confirmed either by the Forefaulted persons immediat Superiour, or by the King, *Quaritur*, If his Right will fall under the Forefaulture? *Ratio Dubitandi*; *Licet in feodare, & noxa caput sequitur*: and yet is thought it will fall under the Forefaulture; Because *resoluto jure dantis &c.* And though it be lawful to grant Sub-altern Rights yet it is alwayes *cum sua causa*.

A Superiour being Forefaulted, and his Vassals Right not being confirmed, and so falling: *Quaritur*, If His Majesty should confirm the Vassals Right, if that will be *habilis modus* to secure against a posterior Donator? *Ratio Dubitandi*; The Vassals Right being altogether extinct by the Forefaulture, there is nothing to be the subject of a confirmation, which cannot be of *non entis*; and the Vassal should have obtained a Gift upon the Forefaulture. And *contra*, The Vassals Right not being null of it self, but such as could not prejudice the King when Lands return to him by the Forefaulture of the Superiour, because he did not consent to the same; his consent thereto at any time may convalidate the Right before *Jus* be *quasitum* to a Donator.

If, after Forefaulture His Majesty having granted a Remission, the person Forefaulted is reintegrated to his Estate, as if the Forefaulture had not been: or if he should take a new Right upon the Forefaulture?

When a Forefaulted person has Right to succeed to any other person as Heir; so that not only his own Estate but what would belong to him if he had entered Heir, would fall to the King by his Forefaulture; *Quaritur*, will the King be Lyable to the Debts of the Defunct; seeing he does not succeed to the Traitor's own Estate and Patrimony, but *in hereditatem*

que

*quæ est nomen universitatis*, both as to the *Debitor* and *Bona*: and there is no reason that the Defuncts Creditors should be prejudged, unless they had been *in culpa* either themselves or their Debitor.

His Majesty having presented, upon Forefaulture, a Vassal; If that Superiour should be thereafter Forefaulted; *Queritur*, If the Feu not being confirmed, will fall under his Forefaulture? *Ratio Dubitandi*: The Feu is in the same condition with other Subvassals; so that if he do not apply for confirmation he is lyable to the same hazard. And yet on the other part it may be thought, that the reason why Confirmation is necessary is, because when Lands return to the King they return as they were given free of all Rights and Burdens, but such as the King did consent to; which doth cease in this case; seing the King is not only Consenter to the Subvassals Right but is Author by the presentation.

A Person having committed Treason, and thereafter his Kinsman to whom he might have succeeded, being Deceased, *Queritur*, If that Defuncts Estate will fall to the King, or go to the next Heir? *Ratio Dubitandi*: That there seems to be a difference, betwixt the case in the fifth Question of the Title *Heirs*, when a person being Appearand Heir, and having *hereditas delata* before he commit Treason, the same should fall to the King; seing he was *Hæres habitu*, and had *jus radicatum* in his Person before his Treason, and therefore Forefaults the same to the King. Whereas in this said other case, when the Succession fell, the Traitor could not have any Right in his Person being *nullus* and incapable of Succession: So that it cannot be said that he is *Legitimus* and *propinquior hæres*.

A Person holding Lands Ward of the King did give an Infeftment to be holden of himself Blensh, and the same being confirmed by the King, the granter was thereafter Forefaulted, so that the Subvassal did come to hold of the King: *Queritur*, Whether he will hold as he did formerly, or Ward as his immediat Superior did?

A Person being Appearand Heir both in Land and Heretable Sums, but not being served Heir; And being Forefaulted after the Decease of his Predecessor: *Queritur*. If he doth Forefault not only the Lands but the said other Heretable Estate? *Answer*. It is thought there is a difference betwixt Lands, and any other Heretable Estate; seing the Appearand Heir is obliged to enter to his Lands to the Effect the Superiour may have a Vassal Lyable to Service or other Duties; so that his not entering is *delictum, vel quasi*; and the Lands are in Non-entry: And he is in the same case in Relation to the Superiour, as if he were entered: Whereas, as to any other Heretable Estate, he needeth not owne or claim the same but if he pleases; and he cannot have Right unless the same be settled upon him by a Service: and consequently cannot Forefault that which is not his. *Vide supra, in the Question concerning Cefnocks Forefaulture.*

A Band being granted to an *Englishman*, but bearing Registration in *Scotland*; and being granted by a *Scotsman*: If the Person Creditor be guilty of Treason, whether it will fall under Forefaulture in *England*, or *Scotland*?

*Cum essent Sempronio duo filii, Primogenitus patre adhuc vivo perduellionis damnatus fuerat; postea patre mortuo, utroque filio superstite (nam perduellis fuga se subduxerat) de hereditate patris ambigitur an ad primogenitum & ex ejus*

eius persona ad Fiscum pertineret? Nam Jure civili quod indigno aufertur fisco quaeritur: & Jure nostro hæres apparens, Majestatis damnatus, nedum sua sed bona hæreditaria & prædia quæ sua forent, si adita esset hæreditas, amittit & ad fiscum transfert.

Sed distinguendum, Et multum interest, an filius, præmortuo patre, crimen postea admiserit; an vero (ut in casu prædicto) ante patris obitum Majestatis reus & damnatus sit: priori casu cum primogeniti persona adhuc integra sit, constat a morte patris dies cedit & hæreditas ei delata est; adeo ut qui etiam patre superstite hæres fuerat in spe, Jam incipit hæres esse habitu & spe certa & radicata, cum libuerit actu & aditione hæres futurus: si igitur postea maximam capitis diminutionem patiatur, hæreditas ipsi delata & jus succedendi in fiscum transit: altero vero casu, filio ante mortem patris damnato, hæreditas patris morte nec delata est nec deferri potuit, utpote pæna servo, & qui in jure nullus, nec personam habeat in qua successionis jus radices agere queat: his consequens est, fratrem juniorem patri heredem fore; quia absurdum esset patrem a crimine alienum, & forte tam suis quam familia meritis commendatum, ex delicto filii nihil amittere dum viveret (noxa enim caput sequitur) morientem autem tum bona tum familiam & memoriam perdere: nec perduellis aut fisci melior debet esse conditio, quod damnatus pænæ se substraxerit: & extra quaestionis aleam est, secundogenitum patri heredem futurum primogenito patri præmortuo.

2da. In ista specie facti suboritur quaestio, viz. si venia data restituatur primogenitus, an frater desinit esse hæres? Et quidem distinguendum est, imo. An cum restituitur, hæreditas integra & ex asse adita sit, fratre ex inquisitione hærede renunciato, & in omnibus quæ patris fuerant prædiis investito (cum enim terræ in hæreditate sunt, ante investituram haud censetur esse aditio) isto casu restitutio quæ est ex gratia nemini nocet nisi concedenti; nec adimit jus fratri quaesitum: & quod rite constitutum & quaesitum est haud corrumpit etsi casus evenierit a quo incipere non poterat.

2do. Sin restituatur primogenitus, hæreditate nondum ullatenus adita; eo casu quia res adhuc est integra & sublato obice per restitutionem, qui operas ne hæres esse possit; incipit hæres esse habitu & aditione actu hæres erit.

3tio. Hæreditate partim adita partim non, fra. v. in quibusdam terris investito in quibusdam haud asito; novissimo isto casu frater in iis quidem terris in quibus investitus est hæreditatem retinebit; in reliquis primogenitus hæres erit: tantum adeo discrimen est inter jus inchoatum & id quod penitus consummatum & quaesitum est: Multa enim cadunt inter calicem supremaque labra.

### Forisfiliation.

**Q**uaeritur, If the granting of a Provision to a Child importeth Forisfiliation; so that the Child cannot claim a Bairns part? Or if it be to be considered what the subject of the Provision is? Viz. Whether it be Heretable or Moveable: Seing in the first case it seems that the Provision being out of a different Subject should not exclude from a share of Moveables? David Scot Son to Walter Earl of Buccleugh.

### Funeral Charges.

**I**F Funeral Expences should be deduced as a Debt off the whole, or only off the Deads part?

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If



If the Funeral Charges for Burying the Husband, should affect the whole Moveable Estate, or the Deads part? *Answer.* It should affect the Deads part; seing it is not a Debt contracted during the Communion: And the Deads part cannot be used or employed better than to Bury him.

If the Funeral Charges should be deduced in Relation to the Quot, so that the Quot should be only of the Deads part free of the said Debt? *Answer.* It is thought, it should not be deduced, for the reason contained in the preceeding Querie.

## G.

*Gestio Heredis.*

**I**F an Appeard Heir medle by entering to the possession of Lands, whereof the Defunct was in possession; but his Title is found there-after to be void: Will his medleing import *Behaviour & aditionem passive.*

*Gift.*

**T**HE late King having granted to a certain person the Gift of an Office at His Majesties presentation; There is a Gift of the said Office granted to another person by one having Right by a late Gift to present to the said Office; notwithstanding that the person who had the former Gift *ad vitam* or *culpam* is yet Living and is not deprived: And it is now desired, that His Majestie should not only ratify the said late Gift, but that of his certain knowledge, proper motive, and by vertue of his prerogative he should give a new Gift of the said Office; Revocking and annulling the former Gift granted by the late King to the present incumbent; and giving power to the person to be presented by the New Gift, to enter presently to the Exercise and benefite of the said Office, by himself and his Deputes: And ordaining the present Incumbent to deliver up the Registers; and recommending to the Lords of Session to construct His Majesties Gift with the greatest latitude that their *Nobile Officium* can allow: And containing a promise to ratify in Parliament.

*Queritur.* Whether a Gift of the Tenor foresaid be according to Law? *It is Answered,* That the same is altogether against Law and Form, for these Reasons.

*1mo.* By the common Law there can be no valid Gift of an Office or place, unless the same be Vacant; and the manner of Vacation exprest in the Gift; seing the Office belonging to another who has Right to and in possession thereof, the same is not in the hands and power of these who has Right to present, so that they may give the same. *2do.* If it be pretended, that it may be taken *periculo petentis*, and that the Incumbent may be thereafter deprived or may de cease; and that the Gift may be effectual in either of the said cases: Such a pretence is both against Com-

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mon Law and our Practique; ſeing it imports *votum captandæ mortis*: And, by an exprefs Act of Parliament, Gifts of Eſcheat ſhould not be given before they fall by Horning: and there is the ſame Reason as to all other Gifts. 3<sup>to</sup>. That a former Gift granted, by the late King, who undoubtedly had Right to give the ſame, ſhould be Revoked and Annulled without a previous citation of the perſon concerned; and without ſo much as a hint of any reaſons why his Right ſhould be taken from him; is a Streach not only againſt Law and Form but againſt Humanity and Juſtice which is defined *Jus ſuum cuique tribuere, & neminem lædere*. 4<sup>to</sup>. That, what cannot be done in Law and Juſtice, ſhould be deſired to be done by vertue of His Majeſties Prerogative, is an Injury to ſo juſt a Prince; And it is of a dangerous preparative that His Majeſties Prerogative ſhould be pretended for Favours to private perſons, that are Unjuſt and Illegal. 5<sup>to</sup>. Whereas it is deſired, that it ſhould be recommended to the Lords of Seſſion, to conſtrue His Majeſties Gift, if it ſhould be granted, and if there ſhould be any Queſtion upon the ſame; with the greateſt Latitude that their *Nobile Officium* may allow; The ſaid Deſire and Stile is Illegal, and without any precedent; and ſhould not be a precedent hereafter: ſeing there ought to be no prelimitation upon the *Lords of Seſſion*: And it is their Duty, and may be expected from them, that they will conſtrue His Majeſties Grants according to Law and Juſtice: And their *Nobile Officium*; being as the Higheſt Judicatory, to do Juſtice according to Law, they have no Latitude to recede from the ſame.

### *Gift of Eſcheat with Backbond.*

**I**F a Backbond do ſo affect the Gift of Eſcheat, that the Donator cannot Assign the ſame?

### *Gifts of Foreſaulture.*

**L**Ands being Diſponed by His Majeſty, as being in his hand upon Foreſaulture, conform to a certain Decreet of Foreſaulture mentioned in the Right, with the Claufe *cum omni Jure*; and the King having, the time of the granting the Diſpoſition, Right to the Land as being in his hands for committing another Deed of Treason after the former; whereupon there was not a Decreet the time of the Diſpoſition: *Quæritur*. If the ſaid former Decreet be taken away, whether the Donator will have right to the Lands upon the Supervenient Deeds, and new Decreet of Foreſaulture following thereupon? *Ratio Dubitandi*, The ſaid Right is upon a ſpecial Ground, & *cauſa limitat a limitatum producit effectum*: And the Claufe *cum omni Jure* is only *Claufula executiva*; and is only to be underſtood of Inferior Rights to Mails and Duties, by reaſon of Ward, Non-entry or otherways; and not of the right of Property upon other Grounds. *Swinton*.

### *Gifts of Recognition.*

**A** Gift of Recognition bearing Lands holden of the King Ward, to have been Diſponed; but not ſpecifying the ſame; or ſpecial as to the

the Lands but not as to the persons in whose favours the Disposition is made: if it will be valid?

### *Gift of Ward.*

**T**HE Superior having gotten a Gift of his own Ward, either to himself or to another for his behoof, *gratis*; *Queritur*, If the Subvassals may claim the benefite of the said Gift, and to be free of the said Ward? *Ratio Dubitandi*. That in effect the said Gift is a Discharge of the Ward; which being Discharged to the Superior is Discharged to the Subvassal, whose Property falls in Ward only consequentially: and on the other part, as the Superior and Donator to the Ward, may take advantage of the same both against the Vassal and Subvassals; the Vassal ought not to be in a worse case than another Donator.

### *If Gifts of Ward and Non-entry prejudice singular Successors.*

**T**HERE are some Casualties which are Fruits of Superiority, and have *Tractum temporis* as Ward and Non-entry &c. And these being Gifted will be effectual, during the whole time of their endurance; as to the Granter and his Heirs: But there may be question as to singular Successors; Whether the Donator will have right to the Ward and Non-entry, for Years after the Giver is denuded? *Ratio Dubitandi*; That *resoluto jure dantis resolvitur jus accipientis*; and such Gifts are of the nature of Assignations to Mails and Duties, which are not effectual but during the Right of the Cedents: And the Ward and Non-entry do belong to the Superior by reason he wants a Vassal to serve him; and the singular Successor having that prejudice, he ought after his Right to have the benefite of the Casualties. *Vide Liferent-Escheat. Quæst. 7. in Lit. E.*

### *Goods belonging to the Rebels at the Horn.*

**A** Creditor having affected the Moveables of the Defunct, by confirming himself Executor Creditor; and having got possession of the same whereby he is satisfied of his Debt: *Queritur*, If the same may be evicted from him by a Donator to the Defuncts Escheat? *Answer*. It is thought, they cannot be evicted: Seing, *in favorem commercii*, Goods belonging to Rebels may either be Disposed and given by themselves in payment of their Debt, or pointed or otherways affected, before Declarator and Diligence, done by the Donator to affect the same.

### *Grana crescentia.*

**W**HAT is the reason for the astrictiō of *Grana crescentia*? *Answer*. Feuers are in effect *Coloni* and perpetual Tacksmen; And they ought not to be in better case than Tennants, whose *Grana crescentia* were upon the matter thirled, the Food and Expences of Labouring being de-



deduced, it is thought the Tennent will have no more than will entertain him.

### Great Seal.

**A** Gift of the Estate belonging to Bastards or Forefaulted persons whereupon there was no Infeftment, being granted under the Great Seal, *Quæritur*, will it be valid? *Ratio Dubitandi*, The ordinary way of passing such Gifts is under the Privy Seal.

## H.

### Heirs.

**A** Child being served Heir to his Mother, and thereafter the Childs Father being served Heir to the Child; *Quæritur*, if he can be said to be Heir of Line to his own Wife, and ought to be dis-cuss before other Heirs?

A Woman being Married to a Bastard, and having a Child, *Quæritur*, as the Child will succeed to the Mother, whether the Child having no other Heirs, his Father being a Bastard; (so that he cannot have any *Cognati* upon the Fathers side) will his Mother be Heir to him? *Ratio Dubitandi*, That by the Common Law the Mother does succeed; and as the Child does succeed *Ratione Cognationis* and Relation to his Mother, it seems that for the same reason she should succeed to him, the Relation being mutual.

*Quæritur*, If a Son of a former Marriage having Right to succeed by Substitution, in the case where the Father provided Lands to the Son of a second Marriage, and the Heirs of his Body: Whilks Failzieing to the Fathers other Heirs and Assignes, for implement of his Contract of Marriage: There being no other Children of the second Marriage, must he be Heir to his Father; the substitution being (as said is) in favours of the Fathers Heirs? *Ratio Dubitandi*, That in many cases the word Heir to another person than the person *De cujus successione agitur*, is to be understood *hares habitu vel potentia, & non actu*; As if upon considerations a Brother should pass by his Brother of purpose, and Failzieing his own Heirs should substitute the Heirs of his Brothers Body: But in this case it would seem by the Obligement of the said Contract of Marriage and the said right, he has intended that he should be represented himself, Failzieing the Heirs of his Marriage. *Vide the tenth and eleventh Questions in the Title, Successor titulo Lucrativo, Litera S.*

If that should be the Construction; *Quæritur, Quid Juris*, If the Son of the second Marriage should decease, the Father living: Seing the Son of a former Marriage cannot be served Heir to his Father? *Cogitandum.*

Lands being entailed to diverse persons substitute and the Heirs of their Bodies, whilk Failzieing to the other Heirs of Tailzie *successivè*, *Quaritur*, If one of the said Heirs of Tailzie be Forefaulted before the Death of the person in Fee leaving descendents of his own Body, whether will the next Heir of Tailzie succeed? *Ratio Dubitandi*; Because the next Heir who would succeed, Failzieing the Forefaulted person and the Heirs of his Body, cannot be said to be *proximus*; seing the Children of the Traitor are nearer: And though they be *nulli* and *mortui civiliter* they are not *naturaliter nulli*: So that they being incapable; and the others not having *jus sanguinis*; it may appear *quod nullius est pertinet ad Regem*. It is thought, that the nearest of Kin should exclude the Fisk; Seing *qui sunt nulli*, they are not to be considered as to any effect; and especially in that which is odious and exclusive: And it is hard, that the Estate should be Forefaulted by the Crime of a person who had never Right to it.

### Behaving as Heirs.

*Quæ Ratio*, That the owning a Title of Honour, and sitting in Parliament doth not import *Behaving as Heir*; and yet the owning and introumetting with a Sword, or Armour, or any thing else will import *Gestionem*? *Answer*. That Creditors being to be satisfied out of the Goods and Estate belonging to a Defunct Debitor; If the Appearand Heir doth meddle with any part of the sament, *Eo ipso adit passivè, quia miscet se rei*, which should be Lyable to the Executors Execution: But a Title of Honour is not such an Interest, as could be any way Lyable to the Creditor, and the Appearand Heir in owning the same *non libat hereditatem*.

*Quaritur*, If a Ratification by any Appearand Heir of a Right granted by the person he was to succeed to, being yet on Life; will import *Gestionem*? *Ratio Dubitandi*; That he could not be Heir nor *Gerere* during the Defuncts Lifetime: And on the other part, the ratification is granted because he is Appearand Heir, and might question the Right: And as one may be Lyable *passivè* by accepting a Right in the Defuncts time, whereby he is Successor *titulo lucrativo*; so he may *Behave* by a Deed in the Defuncts time.

### Heir of Conquest.

**T**Here being three Brothers, and the middle Brother having an Estate and deceasing after the decease of his Elder Brother, who had diverse Sons; and the Younger Brother being on Life, *Quaritur*, Who will succeed to the middle Brother as Heir of Conquest? *Ratio Dubitandi*; *1mo*. The Younger Brother being Heir of Line; and who would be Tutor to the Children of the middle Brother, if he had any; it may be doubted if there should be a representation in conquest; the Heir of Conquest not being properly Heir? *2do*. Conquest ascending *gradatim*, whether would the Youngest or Eldest Son of the Elder Brother succeed as Heir of Conquest, being both collateral to the Defunct? .

### Discussion of Heirs.

A Person, having provided his Estate to his Daughter, with power to Dispose and Redeem, is obliged that if he should make use of that power in prejudice of his Daughter, he and his Heirs Male and Successors, in that Estate and Dignity, should be obliged to pay a certain great Sum of Money at the first term after his Decease: *Quæritur*, whether his other Heirs or Executors, and not only the Heir Male, will be Lyable to pay the said Sum, at the least *in subsidium*, The Heir Male being first discusst? *Lauderdale and Lady Testar.*

*Quæritur*, *Quo ordine*, A Successor *Titulo Lucrativo* should be Discusst? *Answer.* It is thought, that he should be discusst before the Heir of Tailzie, being in effect a general Heir: Unless Lands be Disposed to an Apppear- and Heir of Tailzie, in which case he should be considered as an Heir of Tailzie.

When the order of Discussion is Renounced; If the Heirs of Tailzie or Provision may have recourse for their relief against the Heir general; who by Law is first Lyable to the Debts: Albeit as to Creditors that order be Renounced?

### Heir and Executor.

Gifts of Ward, Marriage, Non-entry, Do these belong to the Heir or Executor? *Answer.* They are *in rem*, and some has *tractum*, and therefore belong to the Heir.

A Person being obliged by a Bond to Dispose Lands for a certain price, and the Creditor having charged upon the said Bond, and being content to pay the price, and in the *interim* the Debitor deceasing; *Quæritur*, If the Creditor obtain a Decreet for implement against the Heir, whether the party bound to Dispose, his Heirs or Executors will have Right to the Price? *Answer.* It is thought, that the Heir will have Right; seeing there is no Sum due to the party bound; but if he Dispose, which is only *in obligatione*, the said Sum becometh due upon his Disposition; and is not due to any but to a Person who is to Dispose; and the Heir only can Dispose.

If by Contract one of the Parties has Disposed and is obliged to Invest in Lands; and the other is obliged to pay a Sum of Money as the Price. *Quæritur*, If the Seller decease before the Disposition be fulfilled, whether the Sellers Heirs or Executors will have right to the Price? *Ratio Dubitandi*, The Heir only can fulfil, and therefore ought to have the Price; and on the other part, the Heir is Lyable to fulfil by the Disponers Obligation: But the Disponer having taken the Obligation to pay the price in favours of himself his Heirs and Executors, the Sum by the Act of Parliament should pertain to the Executors; And it appears that the Disponer, in place of his Lands, intended to have a personal and Moveable Estate.

What is the Reason of Difference betwixt the last and former case? *Answer.* In the last, there is a Moveable Obligation for payment of Money: And in the other there is no Obligation upon the Creditor, but upon the Debitor to Dispose; But so that if the Disposition be made, a Sum is to be payed, which cannot be payed but to the Disponer's Heir after



after his decease, who only can Dispose, the Debtors Executors can have no right to the same; and it was in the Creditors option either to charge for implement or not, so that the Money was not *in Obligatione* but *in Conditione* or *modo*, If implement should be craved.

When an Order of Redemption is used, and the Money consigned, and thereafter the person against whom the order is used deceases; *Quæritur*, Whether the same will belong to his Heirs or Executors? *Answer*. It is thought, it should belong to the Heir, for the reason foresaid in the last Querie; Specially seeing an order of Redemption may be used against an Apperand Heir: And if that Apperand Heir should after Consignation decease, the Money could not belong to any representing him, who had no Right; and therefore it can belong to no other, but to the Heir, who should be thereafter Heir, and Infeft and should Renounce: And therefore it is thought, that the Money being the Redeemers Money, and upon his hazard untill Declarator, it is never Money of the person against whom the order is used until Declarator; and then being his *in specie* is moveable, and belongs to his Executors.

If a Wadset be granted to a Man, and his Wife, and the longest liver of them two, and the Heirs of the Marriage &c. And an order of Redemption be used and declared against the Husband; and thereafter he decease: Whether in that case, the Money consigned will be heretable, and ought to be given up to be employed for the Wife in Liferent, and the Heirs in Fee? *Answer Affirmative*.

A Bond being *ab initio* heretable by Obligement to Infeft, and Infeftment thereupon; And thereafter there being a Bond of Corroboration granted for the same Sum, but not heretable; bearing to the Creditor only his Heirs and Executors: *Quæritur*, Whether the Sum be Heretable or Moveable? *Ratio Dubitandi*, The same is due, both by an Heretable and Moveable Bond; and the Moveable Bond being Posterior seems to be a Novation of the former, & *posteriora derogant prioribus*. *Et contra*, the said Sum is due still upon Infeftment, and the subsequent Bond is only *in accessorio*; So that *jus principale & primordiale* is more to be considered, as to the question concerning the nature and quality of the Right.

### Heirs Male.

**A** Father, his Eldest Son being Dumb, of purpose to exclude him, as being unable to manage, Doth by a Bond of Tailzie settle his Estate upon another Son, and the Heirs Male of his Body; Whilk Failzieing to his other Heirs Male; with a Provision, That his said other Son and his forefairs should be obliged to entertain the Elder Brother: And if the said dumb person should at any time have the Faculty of his speaking, he should succeed, and the said Bond should be void: *Quæritur*, If the Brother who has got the Estate decease before the Elder, without Heirs of his Body; If the Elder Brother would succeed to him, as Heir Male? *Answer*. It is so evident, that it was intended, that the Elder Brother should not succeed, except in the case foresaid, if he should have the said Faculty of his speaking, And the said Tailzie being made of purpose to seclude him: It is thought, that he cannot succeed by vertue thereof; And his Heirs Males is to be understood his other Heirs Male, by the Dumb Person, who is excluded.

*Obligements, in Contracts, in favours of the Heirs of the Marriage.*

A Person being obliged by his Contract of Marriage, with a second Wife to resign certain Lands, for an Infeftment to himself, and the Heirs Male of the Marriage; and to employ also 60000 *lib.* for the Heirs of the Marriage; And his Eldest and only Son of the first Marriage being bound by a Bond granted thereafter, for implement of the said Contract of Marriage, in the same manner, as if he had been obliged by the Contract; And the Father having accordingly resigned, and taken Infeftment; and the Son of the second Marriage being Infeft as Heir of Provision, in the Lands provided as said is in favours of the Heirs of the said Marriage: *Quæritur*, If the Son of the first Marriage, being after the said Contract Infeft in the Fee of the Fathers other Estate, will be Lyable to relieve the Heir of the second Marriage, of the Debts contracted after the said Fee, as Successor *Titulo Lucrativo*; or being bound for his Father as said is: Upon that pretence, that his Father ought to perform the Obligements of the said Contract *cum effectu*; and to free the Heir of the second Marriage of his Debts? *It is thought*, that the Contract being once fulfilled by taking the Infeftment foresaid, and by employing of the said Sum; both the Father and his Cautioner, the Eldest Son, were immediately Liberate, the said Obligation being satisfied; The import of the same being, that the Son of the second Marriage should succeed as Heir in the said Lands, but not that he should be free of his Debt: Or that being free, the Father could not Dispose the Lands for an Onerous Cause. But if the Father had Disposed the Lands, provided by the Contract, without an Onerous Cause, after the Elder Son his Fee; or had resigned of purpose, to defraud the Heir of the second Marriage; the Father would be Lyable *de Dolo*, and the said Deeds reduceible: But the Eldest Son, being once Liberate, by implement, would not be Lyable. *Tweeddale contra Drumelzier.*

There being Heirs General, and Heirs Male, and of Provision; and Heirs of a second Marriage, being provided by their Mothers Contract of Marriage to certain Provisions, whereunto they have Right as Heirs of Provision: *Quæritur, quo ordine* will the Heirs of the second Marriage be lyable to Debts and Discussion? *Answer.* It is thought, that they being Heirs upon an Obligation *et quasi creditores*, it would appear that they should be Lyable in the last place *in subsidium*, all others being discusst.

In Contracts of Marriage, The Husband being for the most part obliged to provide and resign his Estate, for Infeftment to himself and the Heirs Male of the Marriage; which Failzieing to his Heirs Male of any other Marriage; which Failzieing, the Heirs Female of his own Body, the Eldest succeeding without Division: *Quæritur*, If the Husband should resign and take such a Right upon Resignation; but thereafter should resign in favours of other Heirs: Whether the Heirs of the Marriage may question the said alteration, and what way? *Ratio Dubitandi*, That an Heir is *eadem persona*, and cannot question the Deed of the Person whom he represents. *Answer*, He is not simply Heir, but Heir of the

Marriage: And as to Obligements in his favours he is Creditor. *2do.* It is thought, he may pursue a Reduction of the foresaid Deed, as being in prejudice of him as Creditor: or he may pursue the Heir of Provision by the posterior Right, for implement of the said Obligement.

*Quæritur*, When by such Provisions, there are other Heirs substitute to the Heirs of the Marriage: Whether the Husband may alter the Destinations as to the said other Heirs? And if he do, if they may question the Deed? *Answer.* It is thought, that the Heirs of the Marriage are only in *Obligations*: And the other Heirs in *destinatione mariti*, which he may alter.

A Person being obliged by Contract of Marriage to resign certain Lands in favours of himself and his Wife in Liferent, and the Heirs Male of the Marriage; whilk Failzieing, his Heirs whatsoever: And likewise being obliged, that what he should get by his Wife, by any Legacy, or Right, or Assignment in her favours, to secure and employ the same to himself, and her in Liferent, and to the Heirs of the Marriage; which Failzieing to his Heirs whatsoever: And he having accordingly resigned, and taken Infeftment, to him and her, and the Heirs foresaid: And a Sum of Money having fallen to her, and being uplifted and Discharged, both by him and his Wife, before Inhibition; and thereafter there being Inhibition upon the said Contract at the instance of certain Friends, at whose instance Execution is appointed to follow: These Questions do arise.

*1mo.* If notwithstanding the said Inhibition, he may Dispose the Lands?

*Answer.* He may Dispose the same, being Fiar: And the import of the said Obligement is, that the Right of Succession, as to the said Lands, should be secured to the Heirs of the Marriage, in case the Father should decease in the Fee of the same; so that he cannot provide them to other Heirs: But it is not intended thereby, that the Father should not have the Right competent to all Fiars: *Viz.* That they may dispose of the same, if their condition requires.

*Quæritur*, If he may at least Dispose the same without an Onerous Cause? *Answer.* It is thought not, seeing all Obligements should be understood, *ut actus valeant & operentur*: And though the Father be Fiar, his Fee is by the said Obligement so restricted in favours of the Heirs of the Marriage, that he cannot, fraudulently, and to evacuate the said Obligement, Dispose without an Onerous Cause.

If the Inhibition will be effectual as to the Sum *e. g.* of 10000 *lib.* never employed? *Answer.* It will be effectual as to the Wife: But as to the Heirs of the Marriage, there may be question. *Ratio Dubitandi*, That there being an Obligement, it ought to be once fulfilled by employment to him and his Wife, and to the Heirs of the Marriage: And on the other part, seeing notwithstanding the Inhibition he might have disposed of the said Sum, if it had been employed; there is *eadem Ratio*, if it be not employed; Seeing his Condition may be such, that he cannot employ the same.

If it be not to be considered, what truly his Condition is? And if it be such that he cannot employ the said Sum without Ruine; That he should not be obliged to employ it *Dicis Causa* to be thereafter uplifted? And if a Process may be intended against his Children, to hear and see it Found and Declared, that he should have power to Dispose notwithstanding



standing of the said Inhibition and Obligation foresaid, both as to Lands and Money? Seing if the Money were employed, he could, and might dispose of the same being Fiar: And he is not in that Condition to raise the said Sum, and employ it. *Watson of Damhead.*

### Heirs Portioners.

**W**hen Women succeed as Heirs whatsoever (*v. g.* Three Daughters) they succeed as *Heirs Portioners*, without any privilege of Primogeniture. *Quæritur*, if the Three Daughters succeeding be deceased, leaving each of them Sons and Daughters: Will the Eldest Son of any of them exclude the rest of the Children, and be Sole Heir Portioner to the Grandfather? *Ratio Dubitandi*, As Primogeniture is introduced for the preservation of Families, which does not militate in *successione Famineæ*, Women being *finis & caput Familia*; There ought to be no respect to the same in the second Degree, & *nepotibus*, as there is not in *primo gradu in filiabus*: There being *utrinque eadem Ratio*.

Where there is a plurality of Heirs Portioners, and some of them become *Lapsi*: may the Debt be recovered in *solidum*, from these who are Responsal? *Cogitandum*.

If a Barony descend to Heirs Portioners, will all have Right of a Barony?

If any Superiorities belong to the Barony, will the Eldest only be Superior?

### Heirs of Provision and Substitute.

**W**hatever belongeth to a Defunct in Fee and Property (whether Land or any other Interest) the time of his decease, cannot be transmitted but to Representatives; or these who are *instar hæredum*, and *bonorum possessores*, as in the case of Lands provided to Bairns of the Marriage, the Bairns are in effect Heirs of Provision: And if Sumes be provided by way of Substitution to another person, after the decease of the Creditor, the Substitute will be Lyable to the Creditors Debt, other Heirs being discussed.

Heirs of Provision being oftimes Strangers, and in *re certa*: *Quæritur*, will they only be Lyable *secundum vires*?

If a Right of Lands be given to a person without mention of his Heirs; And Failzieing of him by decease, to another and the Heirs of his Body: *Quæritur*, Will not the said person who is so substitute be Heir of Tailzie? And if it be so in Lands, why not so in Bonds granted to persons and Failzieing of them by decease to other Substitutes?

### Heirs of Tailzie.

**Q***uæritur*, If there be no Heretable Estate belonging to an Heir of Line, out of which the Executor may be relieved of heretable Debts: Will the Heir of Tailzie be obliged to relieve the Executor of such Debts? *Ratio Dubitandi*; Heirs of Tailzie are not properly Heirs, but *Bonorum possessores*; and Lyable to Debts only in *subsidiu*m: whereas the Heirs of  
Line

Line and Executors are properly Heirs: and the Heir of Line, if the Executry be great and more considerable than the Heretable Estate, may Confer: which is not competent to the Heir of Tailzie or Provision.

The same Question may be betwixt an *ultimus hæres* and the Executor nominate of a Bastard Legitimate.

*Hæreditas* being *successio in universum Jus*; *Queritur*, Why is an Heir of Tailzie called *Hæres*, who succeeds only in *rem particularem*, as *Fundus*? *Answer*. He succeeds in *omne Jus talliatum*, & non *singulari Titulo*; But as representing the Defunct in *ea re: et non interest* Whether there be any thing in *hæreditate quando hæres succedit eo jure; et majus et minus non variant speciem*.

If after a person has succeeded as Heir of Tailzie to a certain Barony, the same be evicted; whether will he be Lyable to the Defuncts Debts? *Ratio Dubitandi*; *semel hæres semper hæres, & sibi imputet* that *adit damnosam hæreditatem*: On the other part, the Heir having succeeded, and having contracted *quasi additione* with Creditors; *intuitu*, that the said Land was to be his; the said *quasi Contractus* should be considered as *ob causam datam & non secutam*.

Heirs of Provision and Tailzie, who are to succeed only in *rem singularem*, albeit *Titulo universali*: *Queritur*, If they will be Lyable to the Defuncts whole Debt, though far exceeding the value of the Succession: Or if they should be considered as *hæredes cum beneficio Inventarii*; and should be Lyable only *secundum vires*: There being no necessity of an Inventar, the subject of their Succession being only as said is *res singulares*? *Answer*. It is thought, that if one be served general Heir Male, without Relation to a singular Subject (as to certain Lands) he would be Lyable *in solidum*: But if he be served only special Heir in certain Lands, he should be Lyable only *secundum vires*.

There being a Right made in favours of a Person as Heir of Provision of a great Estate; and in favours of another as likewyses Heir of Provision of an inconsiderable parcel; *Queritur*, If the person succeeding almost to all the Estate will be considered as Heir of Tailzie, and will be Lyable to relieve the other as Heir of Provision?

When there are two Heirs of Tailzie in diverse Lands, of which the Rent is not equal, but the one much disproportionable and less than the other; *Queritur*, If they will be Lyable to the Debts equally, or proportionally?

### Quo casu, Heirs of Tailzie may be considered, as Creditors.

One having Tailzied his Estate by a Disposition to One and the Heirs of his Body, whilk Tailzieing to other Substitutes; and by a Contract betwixt him and the Person to whom he Disposed his Estate, he having taken the said person obliged to do no Deed in prejudice of the Tailzie, but to preserve it inviolable: *Queritur*, If he the Disposer should make a Disposition notwithstanding; may the Heirs of Tailzie pursue Reduction of the same, as being made in Defraud of them, being Creditors by the said Contract?

If

If after the said Contract is Registrate, the Heirs of Tailzie have *Justitum*: So that the Contracters cannot Discharge, or prejudice the same?

### *Hereditas.*

*Omnia hereditas quodcumque aditur, cum tempore mortis defuncti continuatur, Perez. Lib. 2. inst. tit. 14.*

*Hereditas jacens sustinet Personam Defuncti. Ibidem.*

*Si Heres instituitur sub impossibili conditione; instituitur pure; & conditio habetur pro non adjecta. Perez. ibidem.*

*Idem, Si institutio fiat ad tempus: habetur enim tempus pro non adjecto, & utile per inutile non vitiatur, Ibidem.*

### *Aditio hereditatis.*

*Aditur hereditas, vel verbo, vel facto; verbo declarat (scilicet voluntate) se velle heredem esse: Facto vero Gerendo pro herede, & immiscendo, Dummodo sciat delatam ad se hereditatem: Regula enim est, Omnia qua animi destinatione agenda sunt, non nisi vera & certa scientia perfici possunt. Perez. Lib. 2. tit. 19.*

*Aditio hereditatis non requirit hodie solennia verba, ut olim Cretio. Ibidem.*

### *Heres Contrahens.*

*Heres videtur contrahere cum Creditoribus & iis satisfacere debet.*

### *Repudiatio Hereditatis.*

*Qui repudiavit hereditatem, non amplius ad eam admittitur: qui tamen a Creditore rite interpellatus est ut hereditatem adeat, & repudiat; non prohibetur eam adire quoad alios Creditores.*

*Qui heres institutus est sub conditione, ut non adire, ita non potest repudiare ante eventum conditionis: Regula enim est, Quod quis si habere velit habere non potest, repudiare nequit.*

### *Servus Heres.*

*Instituto servo herede; eo ipso datur libertas sine qua heres esse non potest, Perez. lib. 2. inst. tit. 14.*

### *Ultimus Heres.*

*If a Donator by a Gift of Ultimus Heres will be Lyable to the Defuncts Debt personally Effairand to the Estate? And if he be not, what course shall be taken to affect it?*

*If such Universal Successors be Lyable in solidum, (If they be found to be Lyable Personally) unless they give up an Inventar? And what shall be the method of giving up an Inventar?*



*Heirship Moveable.*

**I**F a Son that is Forisfamiliar, and has a Family, will get a Moveable Heirship by his Father? *Ratio Dubitandi*, He is sufficiently instructed, and accommodated as *Pater Familias*: And *e Contra*, the other Children, though Forisfamiliar will be Executors, and Exclude him; and in that case there is no Reason, that all should be Executory, and the Heir Excluded.

Whether a Coach and Cart will fall under Heirship with the Horses belonging thereto the time of the Defuncts Decease? And whether not only the Plough, but Oxen or Horses that goes in the same, will belong to the Heir?

An Heretrix being Married, *Queritur*, If she may have a Moveable Heirship? *Ratio Dubitandi*, That she is in *Familia Mariti*, and has none of her own? *Lady Levin*.

*Queritur*, If a Jewel may fall under Heirship; upon pretence, that it is the Jewel of the Family? *Ratio Dubitandi*, Jewels are only *Jocalia*; and Heirship is properly *Instrumenta fundi*, or *Domus*: And in England are called *Heir-looms*.

*In Saxonia & finitimis regionibus peculiares quaedam species sunt in quibus proximus agnatus succedit; quas Heergevettam, vel res expeditorias vocant.*

*Inter reliquas res, ad eum pertinet equus optimus cum ephippio viri mortui, gladius, optima armatura, &c. Befold. Thesaur. litera H. 33. Heergevettam.*

### *Money consigned for Redemption whether Heretable or Moveable?*

**M**oney being consigned upon an order of Redemption, *Queritur*, If after Decree of Declarator the same be heretable or moveable? *Ratio Dubitandi*, That it belongs to the Creditor, and is moveable, and as it were in Cash; which of its own nature is moveable: And on the other part, *Surrogatum facit naturam surrogati*, and as the Relict would have a Terce, so the Heir, who only can Renounce, ought to have right.

### *Sums Heretable or Moveable.*

**A** Sum being due by Contract, whereby the Buyer of Lands is obliged to pay the price; But so, that it is provided that it should be retained for payment of annual rent, until an investment of warrandice upon the Lands be purged: *Queritur*, whether the said sum be Heretable or moveable?

### *Homologation*

**S**ir William Ker having got a Right under the great Seal to debateable Lands upon the borders, wherein Ker of Cherrytrees pretended a Right and Interest and Property by a prior Gift; and Bennet of Grubst an interest of

of Commonty: The said Sir William Ker and Cherrytrees did by a minute oblige themselves to communicat their Rights, so that Sir William Ker should dispoſe to Cherrytrees his Right as to the part of the ſaid Lands Cherrytrees was in poſſeſſion of; and that Cherrytrees and his Succeſſors ſhould be obliged not to queſtion Sir William Ker his Right: Thereafter Cherrytrees offered to aſſigne the ſaid minute to Grubet: *Quæritur*, whether or not the accepting of the ſaid aſſignation would import an homologation of Sir William Kers Right, and a paſſing from Grubets Right: And if Grubet by the Obligement forſaid, would be obliged not to queſtion Sir William Kers Right as to Grubets part of the ſaid Commonty? *Answer*. That *actus agentium non operantur ultra eorum intentionem*; and Grubet did not intend to prejudice himſelf, but to better his Right and to be free of a plea; and he could not queſtion Sir William Kers Right upon that which he was to have from Cherrytrees; But could not be barred to queſtion the ſame upon his own Right which he had not from Cherrytrees.

A Tailzie bearing a claue irritant, That the courſe of Succeſſion ſhould not be altered, and that the Contraveener ſhould Loſe the Right; And the Heir of Tailzie in minority having reſigned in favours of other Heirs that were not contained in the Tailzie, and being infeſt upon the ſaid reſignation; *Quæritur*, if the ſaid Heir after majority continues to poſſeſs and to adminiſter, and has granted Commiſſion for doing other deeds concerning the Management of the Eſtate *intra quadriennium utile*, but before intending of reduction *Ex capite Minoritatis*: Will he be thought ſo to homologat the ſaid alteration, that he cannot queſtion the ſame, and cannot be reponed againſt the committing of the ſaid claue irritant? *Answer*. It is thought that the poſſeſſion will not import homologation, ſeing it may be aſcribed to the former Right which cannot be ſaid to be altogether extinct by the ſaid other Right; the ſame being null at Leaft *annullandum* and reducible. *Vide Tailzie altered in Litera T.*

### Horning

**I**F a perſon charged may be Denounced year and day after the charge without a new intimation?

- If a Pupil may be charged and Denounced, and taken with Caption? *It is thought not*, ſeing he can neither *Velle* nor *Nolle*, nor obey nor diſobey;

- There is not *Eadem Ratio* as to Minors.

If it may be objected againſt a Judge that he is at the horn, ſeing Parties may be debarred from pleading as not having *Personam*; And there is the ſame Reaſon to debar Judges a *Judicando*?

### How far a Husband is lyable for his Wifes Debt?

**S**Eing the Husband by his Marriage has Right *Jure Mariti* to all moveable Eſtate belonging to the Wife; and acquires the ſame *per Univerſitatem*, as if ſhe had made an Aſſignation and Right in his Favours. *Quæritur*, Whether he will be lyable to all her Debts, at leaſt Moveable; *quia penes quem commoda penes eundem incommoda*? At leaſt if he will be lyable *peculio-sennus, in quantum locupletior factus eſt*?

If

If there be any difference betwixt a Husbands getting a Tocher, and when there is no Tocher but *Jus Mariti*? Seing in the first case, he is a Creditor by Contract *singulari Titulo*: And in the other, he has right *Titulo Universali omnium bonorum*, which are understood *Debitis deductis*.

If a Husband may be lyable for his Wifes Debt, the Marriage being dissolved?

Item, If after the Marriage is dissolved, any Debt come to his knowledge, that did belong to his Wife during the Marriage: Whether he might pursue for the same?

How far the Husband will be concerned in his Wifes Debts, *Activè* or *Passivè*?

### *De Hypothecis, vulgo Wadsetts.*

**I**cet tam instrumento alienationis quam Charta a Domino directo concessa terræ ipsæ alienentur, Jus proprietatis nonnunquam haud transit; sed inferius, Hypothecæ forte ceu impignorationis: Cum enim juxta regulam *plus cautionis sit in re quam persona*, aliquando prædia a debitore alienantur in majorem cautionem & securitatem ut loquimur. Hypotheca autem terrarum alia apud nos impropria dicitur, alia propria, nec minus ista, hæc magis propriè est impignoralis. Pignus siquidem & hypotheca propriè datur, ut Creditori caveatur, non vero ut utatur nisi die solutionis adveniente, debitor in mora aut non solvendo sit: impropria vero Invadiatio ea dicitur, cum creditor prædii jus & investituram nanciscitur ut sibi tam de sorte quam usuris cautum sit, sed ea Lege ut prædii possessio penes debitorem remaneat, non jure proprietatis qua proprius exuitur, sed conductionis: id fit pacto in Instrumento alienationis inserto, quo Creditor qui per alienationem Dominus et vassallus est, prædium ut suum relocat debitori, stipulatus annuam mercedem quæ solennes et licitas pecuniæ usuras haud excedit; addito etiam pacto de reversione seu retractu, seu redimendo, quando aut debitor aut creditor voluerit; aut prout convenit inter contrahentes: Hypotheca quæ propria dicitur ea est, quando scilicet prædium non tantum in Cautionem sed *activè* alienatur; & tam terræ quam pecunia quasifunctionem recipiunt; ita ut pecuniæ usus quæcunque sit ad Debitorem; prædii vero usus & possessio etiam naturalis ad Creditorem pertineat; sed sub modo & pacto de retrovendendo: Ex his varia nec levia emergunt Dubia.

Inter ea est illud, si ex delicto Creditoris qui ex Investitura vassallus est, feudum ad Dominum Superiorem redierit; terris forte (si prædium militare sit) ultra modum licitum & semissem alienatis, aut alio delicto feudali, vel ex crimine læsæ majestatis: An Dominus illud habeat ut optimum maximum, & quale ab initio charta originali ab eo aut ejus Decessoribus aut Authoribus profectum fuerat: vel tantum ut Hypothecatatum aut Impignoratatum, & Retractui & Juri reluendi obnoxium.

Plerisque (ut arbitror) videtur Creditorem multandum jure suo tantum, salvo debitori ejus culpæ haud affini jure suo & Retractu, cui Dominus Superior consenserat pacto isto de redimendo in ipsa charta inserto: & pro hac sententia stare videntur trita illa Juris Axiomata; *Noxam*



*“caput sequi, Nec ullum factō suo sive ex factō sive ex delicto, plus juris in alium transferre posse quam ipse habet.*

“Verumtamen acriore & fixo obtuitu penetrantibus & ut par est omnibus rationum momentis ultra citraque scrutatis, Jurisconsultis adversa ut opinor placebit sententia, earum (quæ sequuntur) rationum suffragio subnixæ, siquidem illud quod agitur magis inspicere quam quod concipitur, & actus agentium ultra eorum intentionem haud operantur: quicquid autem inter Debitorem & Creditorem agatur, id inter Dominum & Creditorem vasallum agitur, ut ex alienatione prioris vasalli isti is sufficiatur & ei vasallus sit, eodem nec alio modo aut jure quam prior, Dominio directo & ejus fructibus & compendiis salvis & illibatis: interea haud autem exiguum est, ut, ex Recognitione ob alienationem aut quovis delicto Feudali, Feudum domino commissum, ad Dominum remaneat quale ab initio fuerat, aut rediturum fuisset, si prior vasallus deliquisset: Nec præsumendum Dominum, pro laudemio quod in Hypothecis si non minus haud majus esse solet eo, quod pro alienatione simile dependitur, Dominium suum ejusque fructus velle carpere aut imminuere.

“Accedit, quod pacta ista inter Debitorem & Creditorem, quoad Dominum sunt extrinseca; nec ejus jus aut Dominium directum sed vasalli & Dominium utile afficiunt: Quamdiu igitur Creditoris Jus & Dominium utile adhuc durat, pactis istis subjacet; eo autem sublato & amisso, pacta ista, quæ ei inhærent & accessoria sunt, cum principali evanescent.

“Adhæc, feudo ex delicto Creditoris qui vasallus est Domino commissum aut ob Perduellionem amisso; vel prædium ad Dominum pertinebit, quale fuerat ante Hypothecam, aut jus tantum Hypothecæ: Dici autem nequit Hypothecam Domino committi, ea enim est cautio in rem pro pecunia, & inanis & accidens esset sine subjecto, si Domini esset sine pecunia, quæ, ut nunquam ejus fuit, ita demum redire nequit.

“Nec obstat illud, *Neminem plus juris in alium transferre quam ipse habet*; multis enim casibus Jus quod vasalli fuerat, sed factō suo imminutum, & vel servitutibus, vel Juri Retractus ab eo concessio obnoxium, plenius ad Dominum redeat, feudo ex delicto commissum.

“Nec magis officit, quod Dominus pactis istis videtur consensisse; ea enim non inter Dominum & Debitorem & Creditorem inita sunt, sed a contrahentibus ipsis apposita & chartæ inserta ne personalia videantur; & ut afficiant vasalli jus ad quoscunque ejus successores perveniat; non vero ut imminuant aut lædant jus Domini directi; id ex ipso pacto de reversione ejusque verbis elucescit; eo enim cavetur prædium per Debitorem ejusque hæredes & assignatos redimi & relui posse, sed a Creditore ejusque hæredibus & assignatis in jus creditoris succedentibus; Dominio autem utili ex delicto caduco & extincto nillum jus superest creditori, in quod ejus hæredes aut assignati succedant; quodque ab iis redimi & retrahi possit; nec Dominus, vasallo ob delictum dominio utili privato, in id creditori succedit: Jus enim suum ex delicto amittit quidem, non autem transmittit nec amissum transferre potest: utque unaquæque res ad naturam suam facile redit; ita plena proprietas, quæ ante concessionem vasallo aut iis a quibus causam habet domini fuerat, eorum jure extincto ad dominum redit & reviviscit.

“Porro, si ex delicto Creditoris, qui solus in feudo & vasallus est, non

“committatur feudum ipsum quale a domino profectum fuerat; sequitur  
 “illud tum incommodum tum absurdum, Latifundia *sciz.* & Baronias quæ  
 “pro modicis pecuniarum summis in cautionem & Hypothecam impro-  
 “priam dari solent, spreto domino impune alienari posse; debitore penes  
 “quem est jus reversionis illud cedente; ex ejus enim facto & alienatione  
 “nihil domino obvenit aut committitur, in quem nihil commisit aut de-  
 “liquit jure suo usus, cum in feudo & fassina haud sit nec ulla inter eum  
 “& dominum necessitudo & obligatio interveniat, quæ alienationem im-  
 “pediat.

“Ex supra dictis conficitur, in Hypothecis, vasalli jus quoad Debitorem  
 “pactis de retrovendendo & relocando substrictum & obnoxium esse; quo-  
 “ad vero superiorem liberum & solutum: & creditorem eodem quo alii  
 “vasalli jure censer: nec queri potest debitor, cum creditoris fidem &  
 “conditionem suo periculo elegerit; & si locuples sit adversus eum pro  
 “damno refarciendo agere possit.

“Si hæc sententia durior videatur, facile erit ejus rigorem emollire pacto  
 “de retrahendo, ita ut diserte caveatur prædium, nedum a creditore e-  
 “jusve successoribus, sed & a Domino si ad eum pervenerit ex delicto  
 “creditoris, retrahendum; pecunia credita ei persoluta: sic domino sci-  
 “enti & volenti nec fraus nec injuria fiet.

### Tacite Hypotheek.

**Q**Uæritur, If a Tacite Hypotheek being not only of *Fructus*, but *Instru-  
 menta Fundi*, *Quid Juris* in Grass-Rooms, where there is nothing  
 payed but Silver?

What is the effect of a Tacite Hypotheek? And if a Tennent should  
 sell his Corn in a Mercat, may not the Master pursue *Actione Hypo-  
 thecariâ* against the Buyers, who should know the condition of these with  
 whom they Deal?

The Heretor of Lands or Master having a Tacite Hypotheek for a Years  
 Duty: *Quæritur*, If the said Hypotheek be also well for the Stocking  
 upon the ground, as of the growth and Encrease?

*Quæritur*, If the Rests of diverse Years amount only to a Years Duty;  
 whether the Master will have any Hypotheek as to an Years Duty to  
 made up? Or if it be understood only of the Rests of the immediatly pre-  
 ceeding Year?

## I.

### Immobilia.

**Q**UÆ res inter *Immobilia* computentur? Thef. Bef. litera L. p. 597.  
 ad finem.

*Pana & multa non exacta immobilibus accensentur Ibid. Item  
 servi ascriptitii, Ibidem.*

*My-*

*Munitiones cum castro consideratæ tormenta & arma bellica, si testator res pretiosas in Familia servari jussit. Ibidem p. 597.*

### *Immobilia per applicationem & aliis modis.*

*Immobilibus accrescunt & accedunt mobilia variis modis; quod enim applicatione perpetua corporibus alterius naturæ affixum infossum aut inædificatum est, Immobile fit; nam mobile Immobili cohærens Immobile censetur, Hering. de mol. quæst. 8. N. 18. & 19.*

*Per immutationem res mobiles sortiuntur naturam Immobilium, ex quinque causis. 1. Facto hominis, ut Affixione, Infossione, Adjectione. 2. Legis potestate & fîctione, ut cum colonus ascriptitius aut mancipium rusticum glebæ serviens pro re Immobili censetur. 3. Attributione seu destinatione, ut lignum ad ædificium destinatum inter Immobilia computatur. 4. Subrogatione ut, quibusdam casibus, pecunia. 5. Subjecto v. g. quando fura nomina & actiones ad Immobilia competentes aut mobilia pro talibus habentur. Hering. de. molend. Ibidem. n. 20. & sequen.*

### *Imposition upon the Pint of Ale.*

*Q*ueritur, If the Gift of the Town of Edinburgh and other Burghs, of Two Pennies upon the Pint of Ale, or Two Merks upon the Boll of Malt, may be questioned by any concerned, upon that ground, that being a burden upon the People it could not be laid upon them, without consent of Parliament? *Answer.* It is thought, it may be questioned. 1. For the reason foresaid, being the fundamental of the Liberty of the People. 2. The whole Countrey is concerned, and has prejudice thereby, In respect that they who dwell within the Lothians, will suffer as to the price of their Bear; which will be less in consideration of the said burden of Two Merks upon each Boll, and consequently the whole Countrey will be prejudged; The price of the Bear in Lothian being the standart almost of the whole Countrey, Edinburgh being *Communis Patria*; And the Drink upon that occasion being both worse and dearer: And the Shires of Lothian having concurred they came, in end, to a condescendence, that the Town should be obliged never to desire the like: And it is thought, that the Gift, both in passing at the Exchequer, and ratification thereof in Parliament, was so qualified. 4. A Bond was given by the Town to that purpose to the Colledge of Justice, and also to the Shires, and both were trusted to one of the Commissioners for the Shires to be kept; and, it's informed, was given back by him *viis & modis*, 5. The pretence of Debts, and alteration of the way of living of the Magistrates is frivolous, Seing the Town ought not to Contract Debts, the Magistrates being only in effect *Curatores*; And the King could not lay a Burden upon the Countrey for payment of his own Debts; and the Debt of the Town is no less than it was formerly before the first Gift: and the Magistrates should not live upon what is given to the Town. 6. As to the pretence of his Majesties Prerogative; it is against Law, and the common stile of the Chancery, which should not be altered; and His Majesty doth make use of his Prerogative to remitt the rigour of Law, but not to give Illegal Grants, *rei alienæ*, to prejudge and Burden others: And therefore such Grants are ever understood *Salvo Jure*, and to be *periculo petentis*. 7. The dispensing



penfing with the former Bond is of dangerous confequence; His Majefties Prerogative being never againft Juftice; and for taking away the Bonds and Rights granted to the People, without their own confent: otherways there fhould be no fecurity for Liberty and Property.

### *Impositions of Burdens upon Shires.*

**S**eing Shires are not Incorporations, *Queritur*, If upon any Pretext whatfomever, The Major part may lay any Burden upon the Shire, or any part of it without their Confent?

### *Impositions voluntary upon Shires.*

**W**hen any Charges for Banner, Trumpet, or Coat &c. for the Heretors, are to be payed, *Queritur*, Whether the fame are to be payed *virutum & per capita*; or proportionally according to the Valuation? *Answer*. They are Personal and not Patrimonial: and are to be payed with refpect to the perfons, and not their Eftates.

### *Improbations.*

**I**F Purfuers of Improbations fhould confign? Of late fome are of Opinion, That Confignation is to be made only when Improbation is propounded by way of Exception: But the Act of Parliament anent Caution in Improbations, in place of which Confignation is come, is clear as to all Improbations by way of Action or Exception.

It appears, there fhould be a difference betwixt a general Improbation, at the inftance of Heretors and Buyers, which is a Tentative ufed to try the condition of the Lands if they be affected with any latent pretences: And the cafe of fpecial Improbations, and Improbations of certain Writes; and that in this cafe there fhould be Confignation; but not in the other: unlefs upon Production, a particular Right be taken to be Improven.

When in Improbation Writes are produced, and certification craved *contra non producta*; and it is alledged that the Defender has produced fufficiently to exclude the Purfuer: *Queritur*, If notwithstanding certification fhould be granted? *Answer*. By the late Practique the Lords are in ufe to hear the parties debate upon the Right: which is thought hard, feing if the Defender be confident of the Right he has no prejudice by granting the Certification, and having gotten long termes he ought to produce all Writes called for: Seing Improbation *est processus tentativus*, and in order to try the Defenders pretence, and not to debate a Right.

### *Impugning the Authority of Parliament.*

**B**Y an exprefs Act of Parliament, The Impugning the Authority of the Parliament confifting of three Eftates, is Treafon. *Queritur*, If the mifconftreuing, or Impugning the proceedings of the Parliament, if they amount to Treafon? *Answer*. There is a difference betwixt Impugning Authority, and Proceedings of Judicatories; feing Judges may have an unquestionable Authority, and yet their proceeding may be queftioned;

stioned: And Papists, and Hereticks cannot controvert the Authority of Parliament, and yet may be dissatisfied with and misconstrue the proceedings of the same: Which practice, though Criminal, doth not amount to Treason. *Traquair. Item, The Earl of Argyle.*

### *Incendiarium.*

*Incendarii. vide in Thef. Bef. Lit. M. 72. p. 647.*

### *Incorporations.*

**I**F a Colledge or Corporation, being in Law a Body, may Forefault the Rights of the Corporation, and in what case? *Ratio Dubitandi*, Magistrates are only Curators, *loco Curatorum*; and the University never Dieth; and Bishops, and such other sole Corporations, though they commit Barratry, do not Forefault in prejudice of their Successors.

When a Town or Incorporation, that has Power to Contract Debts, do grant Bond obliging the Magistrates and their Successors, and bearing Horning and other Executorials, *Queritur*, If succeeding Magistrates may be charged with Horning? And if they be denounced, will the Escheat of their own Moveables fall, or only of Moveables belonging to the Town? *Ratio Dubitandi*, *Officium nulli debet esse damnosum*; and they are not bound themselves personally, but only they and their Successors *in officio* in behalf of the Corporation: And on the other part, if they should not be Lyable, the Execution would be elusory: and though it is not just that they should pay such Debts out of their own Estate, yet they are lyable to pay the same out of the Estate of the Corporation: and if they cannot raise so much for the time, out of that Estate; they should Suspend, and make it appear, that they are neither *in mora* nor *in culpa*.

*Quid Juris*, As to Compyring or Adjudication as to such Bonds? Whether it should be only of the Publick Estate, or of the present Magistrates likewise? Specially after the Letters are found orderly proceeded, upon a Suspension discusst against them.

After the Magistrates are denounced and Year and Day at the Horn, *Quid Juris*, as to the Liferent Escheat, whether will that of the Town fall? and how long their Liferent shall be thought to endure? Or if the Liferent of the Magistrates, and each of them will fall?

If the succeeding Magistrates may be charged summarly, and if they be Denounced will their own Escheat fall?

### *Infestment of Annualrent.*

**L**Ands being affected with two annualrents to diverse persons, and being comprised for the bygoness of the first; *Queritur*, If after the expiring of the Compyring, the Compyser (the Lands being sufficient to pay both annualrents) will be Lyable to the second Annualrenter? Seing the Lands were affected therewith the time of the Compyring: And though

the first annualrent was prior, the Debitor did no prejudice to give the second; the Lands (as said is) being able to pay both.

If the second Annualrenter may redeem?

### *Base Infestment.*

**L** And, holding Feu, being disposed to be holden either of the Disponer or of the King; And the Disponer being obliged to infest by two Infestments, the one to be holden of himself Blensh; and the other of the Superiour as the Disponer held: *Quæritur*, If the Buyer think fit to hold of the Disponer and does not make use of the Procuratory; Whether during the time that he continues to hold of the Disponer will he be lyable to releive him of the Feu-duty?

### *Infestment in a Right, both of Property and Annualrent.*

**A** Sum of Money being lent, and thereafter (for further security) the Debitor having granted a Disposition, whereby he is obliged to infest the Creditor in an annualrent out of certain Lands; And likewise to infest him in the property of the Lands (being extended to a twenty pound-land) for security both of the principal Sum and annualrent; So that he might have Recourse both to the Lands and Possession of the same; until he be satisfied, both of the principal Sum and bygone Annualrents: And that by two Infestments under reversion: and that he may have recourse to either Right as he should think fit; and though he should make use of either, that he should not be precluded, but make use of the other also oft as he thinks fit: which Right is granted by a Charter and Seafin following upon the same. *Quæritur*, There being a Non-entry of the Creditor; whether before Declarator, the Retour-Duty of the Lands, or the Annualrent of the Sum (being one hundred pounds sterling Yearly) will fall and belong to the Superior? Seing the Annualrent *valet seipsum*. *It is Answered*. That it is thought, the Right being *instar Hermaphroditi*, and neither properly a Right of Annualrent nor Property, and yet both, It is thought, that in Law (as a Hermaphrodite is reputed to be *sexus prævalentis*) so in this case *Jus proprietatis trahit ad se Jus inferius*: And it being the Design of the Creditor, to secure both the principal Sum and Annualrent, and that the Debitor should continue in possession (and in Wadsets improper, where the Debitor is to possess either upon a Back-tack, or otherways, the Annualrent is not *Debitum fundi*) It is therefore intended that there should be a Right of Property; But so that the Annualrent should be secured in manner foresaid: As if in a Right of Wadset with a Back-tack, it should be also provided, that the Back-tack Duty should be *Debitum fundi*, and that it should be lawful to the Creditor to poind the Ground for the same, as if it were secured by an Infestment of Annualrent.

Infest-



### *Infestment for the use and behoof of another.*

**I**F a Right be granted to the use and behoof of another, will the Right Forefault by the Treason of the Vassal, in prejudice of him to whose use it is? *de quo vid. Wadset Heretable or Moveable, Let. V q. 4.*

And farther if the Vassal be Year and Day at the Horn, whether will his Liferent fall in prejudice of the *Usuarius*? And if the *Usuarius* be Year and Day at the Horn, whether will his Liferent fall to the Superior or not? *Ratio Dubitandi.* That *Usuarius* is not Vassal, and yet has real Interest out of the Lands holden of the Superior.

### *Conditional Infestments.*

**A** Mother, being debarred from her Joynture many Years, upon occasion of Incumberances, and upon that Ground being *Creditrix* to her Son for a considerable Sum of Money; and likeways out, of respect to her Son, having taken a Right to a Compyring for certain great Sums, Did Assign to her Son (being the only Son of her Marriage with his Father) both the saids Interests, to himself and the Heirs of his Body, while Failzieing to her self and her Heirs; with a provision that he should not have Power to alter the said Destination; and if he should alter the same, the Assignment should be void: But the Son, having made no use the said Compyring, and there being no Infestment thereupon, is Infest in the Estate as Heir to his Father, *Queritur*, What way his Mother and her Heirs may be secured, so that the said provision may be effectual to them, in case the condition exist by the Failzieure of the Heirs of his Body? *Answer.* It is thought, that the Son should give her a Bond, making mention of the Mothers favour to him, and of the said Substitution and provision, and that it is just it should be made effectual to her in the case foresaid, if it should fall out; and that by the Assignment her Right is Liquidate in the case foresaid, to 40000 *Merks*, to be payed to her and her foresaids: Therefore, without prejudice of the said Assignment and Provision, he should be obliged and his other Heirs succeeding to him in his Estate, Failzieing Heirs of his Body, to pay to her and her Heirs the Sum foresaid at the first Term of *Whitesunday* or *Martinmas* after the existence of the said Condition, and the Failzie of the Heirs of his Body: And for her better security he is to be obliged to Infest her, and her foresaids in an Annualrent effeirand to the said Sum out of his Estate, beginning the first Terms payment, at the Term of *Whitesunday* or *Martinmas* after the Failzie of Heirs of his Body in case they fail; with this provision, that in respect the said Infestment is not to be effectual, but in the case foresaid, it shall not be prejudged nor questioned upon pretence of any length or lapse of time or Prescription: And that the same shall not Commence or begin to run, until the said Right become effectual in the case foresaid.

### *Publick Infestments.*

**I**F an Annualrent to be holden of the Disponer, be confirmed by the King: *Queritur*, If that Confirmation will make it publick?

It

If an Annualrent be Disposed out of diverse Lands, to be holden of the Granter; and a Decreet of pointing of the Ground be got as to some of the Lands, will it make the Right publick as to others?

### *Inhibition.*

**I**nhibitions upon Bonds or Contracts, if they import only, that nothing should be done in prejudice of the same and execution thereupon? So that the person having reduced upon the Inhibition, cannot make use of the same to sustain any Right, but such as Depends upon the Ground of the Inhibition?

Both the person Inhibited, and the person receiver of a Right being out of the Countrey the time of the Inhibition: *Queritur*, If the Right be Lyable to Reduction? *Ratio Dubitandi*, Both the Inhibited and the party Receiver should be certiorated, and put *in mala fide*: And as the Person Inhibited is not certiorate, if he be out of the Countrey, if the Inhibition be not Execute at the Peer and Shoar of *Leith*, so there is *eadem Ratio* as to the Lieges.

An order being used upon a Conventional Reversion or Legal, against a Person Inhibited: Will the Inhibition affect the Renunciation granted by him; seeing he may be forced to give it, and it has Dependence upon a Right before the Inhibition?

If an Inhibition being Execute against the Debitor only, and being *in cursu* only as to the Inhibiting the Lieges, where the Lands lye being at a great distance; and Intimation in the mean time to the party who is about to bargain with the Debitor; will put the said party *in mala fide*; So that there may be a Ground of Reduction, *Ex capite Inhibitionis* against the party Inhibited; and that the said Right is fraudfully made and accepted, without a necessary cause, in defraud of the Creditor, and after intimation of his Diligence?

A whole Barony of Land being affected with an Inhibition, and being thereafter Disposed in several parcels to diverse persons: If one of the saids purchasers should be distressed by a Reduction *ex capite Inhibitionis* may he have recourse against the others for their proportional parts, for his Relief they being *in rem correi debendi*? *Vide Annualrent Quæst. 1ma.*

If after an Inhibition is Registrate, and Fourty Dayes are past; if the Creditor getting notice that his Debitor has Lands within other Shires, may inhibit the Lieges there, and Registrate within Fourty Dayes? And if in that case the Debitor must be himself again certiorate?

By a Minute, an Estate much incumbered being Disposed; and the price being agreed upon at a certain rate *per Chalder* or 100 *Merks*, But so that the Incumbrances should be purged by the price *pro tanto*, and any Ease by the Creditors should redound to the Seller; and the whole incumbrances being purged, the Buyer should Compt for the superplus of the Free-Money, and should pay beside 20000 *Merks*, after all is purged: *Queritur*, Whether the Benefite of the said Contract can be affected with an Inhibition, or with Arrestment, at the instance of Creditors of the Disponer? *Ratio Dubitandi*; The said Benefite is not Liquid.

If Inhibition does affect Lands acquired after Inhibition? *Answer Affirmative*, The Debitor not being Discharged to Dispose the Lands he has presently, but simply his Lands and Estate. If

If at least it affecteth such Lands as are acquired, within the Shire where the Inhibition has been used?

*Quæritur*, If Inhibition doth affect Bonds though Moveable by the Act of Parliament, so that the Creditor cannot Assign the same?

*Quæritur*, If Inhibition doth affect Bonds, so that the Creditor cannot thereafter Assign the same? *Ratio Dubitandi*, That it is thought, they affect only real Estates and Interests; and there is no mention of Bonds and Debts which are Personal; and they come not under the *General of Goods and Gear*, which are real things: Whereas Debts are *Nomina*, and *Entia Juris & Rationis*.

If Inhibitions affect Lands acquired thereafter? The *Ratio Dubitandi* is, No Diligence can affect *non Ens*, and what did not belong to the Debtor: And if Inhibition will not affect Lands when it is not Execute at the Mercat Cross where they lye, much less can it affect Lands that has not *Situm* as to the Debtor, and does not pertain to him: and the narrative of the Inhibition is, that the Debtor intends to defraud his Creditor, by putting away his Lands, which does not militate, as to Lands which he has not then.

A Bond being granted after Inhibition, and thereupon the Debtor being denounced, and his Escheat Gifted, *Quæritur*, If the Horning and Gift may be Reduced *ex capite Inhibitionis*? *Ratio Dubitandi*, That the Ground being taken away the Superstructure falls, so that the Bond being reduced the Horning doth fall. *Contra*, The King is not concerned upon what Ground the Rebel is at the Horn, if the Horning be valid and formal; and the Inhibition doth import only, that the Debtor should not give any voluntar Right, whereupon his Estate (which is the subject of Execution for Debt) may be taken away: but not if he should commit Crimes, either of Treason, or should be Rebel, or do deeds wherupon Recognition may follow; That the King or other Superiors should be prejudged of their Right and Casualties of Forefaulture, Liferent-Eschat, &c. *George Marshal contra*

### Inhibition upon Teinds:

**I**F Inhibition upon Teinds interrupteth prescription, without a citation; specially where the possessor is in possession by a Right?

If Inhibition puts a party bruiing by a Right, *in mala fide*; so as, before his right be reduced, to be lyable for bygones after the Inhibition? *Tweeddale*.

If to the effect foresaid he be *in mala fide*, because being Commissioner for the Earl of Lauderdale; he prevailed upon the same Grounds against *Oxenford*.

### Insinuatio.

**D**Onationes, quæ excedunt summam quingentorum solidorum sive aureorum, insinuanda sunt; ut effusæ donationes coerceantur, & ne fraus struatur Creditoribus falsis donationibus. *Insinuatio est publicatio donationis apud acta, vel ejus quod agitur apud Judicem in scripturam redactio.* *Perez. Inst. Lib. 2. tit. 7.*



*Instance.*

**B**Y the common Law of the *Romans*, and by the custome of *France*, *Instantia perit* after three Years, as to all effects of it, *v. g.* Interruption of Prescription: But without prejudice of the Action, if it be not prescribed, so that a new Action may be intended.

*Instantia.*

*Instantia perempta omnia acta perire dicuntur, quod intelligendum de ordinariis non de decisoriiis: & Instantia perempta vitium Litigiosi non attenditur.* Thef. Bef. in Liter. I. 22. verbo Instank.

*Instrumentum Guarentigiatum.*

*Instrumentum quod Doctores vocant Guarentigiatum (seu confessatum habet Executionem paratam, & vim sententiae.* Befold. Thef. verbo Guarentigiatum Instrumentum. p. 338. Sect. ultima.

*Interdiction.*

**I**F Interdictions be null, because the Executions do not bear Oyesles? *Park Gordon.*

If a Person having no real Estate, but personal Bonds, may he not be interdicted if there be cause? at the least that he cannot give away his Estate without an Onerous Cause? *Ratio Dubitandi*, Interdictions, are thought only to affect Immoveables. *Mr. John Bruce Minister.*

If a Husband can be interdicted to his own Wife, being in *ejus potestate & cura*?

If an Interdicter can consent to a Deed in his own Favours?

If Interdiction be louséd, will Debts contracted in the *interim* be valid? *Ratio Dubitandi*, That by the lousing it is acknowledged that he is not *prodigus*: And seing no Act of Prodigality or Facility before or after can be instructed, *ex extremis praesumitur medium*, and that he was not prodigal in that *interim*.

If the Heir of a Person Interdicted will be lyable to a Personal Execution, or real against his Moveables?

*Inter decem Dies.*

*Dilatio (Intra) includit sua extrema, & excludit ea quae sunt extra: & si Terminus assignetur ad aliquid faciendum Intra decem Dies, qualibet die dictorum decem dierum actus fieri potest.* Thef. Bef. Lit. I. 16. verbo Inner.

*Intrometter.*

**T**Here being a difference between an Executor confirmed after Intromission, and a Donator to the Defuncts Escheat though declared:

*vic.*

*viz.* That the Executor is lyable to the Creditors, but not the Donator. *Quæ Ratio*, that the Escheat declared should free the Intrometter?

If the Declarator be after intenting of the Cause, will the Intrometter be free?

### *Invecta & illata.*

**I**F a Person astricted as to *Invecta & illata* tholing Fire and Water, should buy unground Malt, and after he had brought it within the bounds astricted has sold it; will he be Lyable for astricted Multures?

### *Duobus Investitis per modum Confirmationis, sed posterius acquirentis Jure prius confirmato, uter sit potior?*

**C**Um prædia alienantur de superiore tenenda, id fit vel per modum Resignationis vel Confirmationis: si igitur Alienatio fiat de Domino superiore tenenda, per modum Confirmationis, & ex ea sasina secuta sit: postea vero alienatio terræ eodem modo tenendæ alteri fiat, & ex ea nedum sasina sed Confirmatio accesserit, ac denique prioris acquirentis Jus sed posterius, confirmatum fuerit: Quæritur, Ex iis acquirentibus uter potior sit? Et quidem dubitationis si ulla, ea subesse videtur ratio, quod per Resignationem alienans penitus destituitur: sasina autem cum sit in re, plus posse & tribuere videtur quam resignatio quæ ad rem tantum est: verum explorati Juris est posterius acquirentem potius esse, cum prior nactus sit jus perfectum & omnibus numeris & partibus absolutum, idque a potestate habentibus; alienans siquidem nec alienatione nec sasina priori data Dominus esse desiit, & penes quem est Dominium penes eum remanet potestas alienandi per quam Dominium definitur: sicut autem alienatio alienanti Dominium haud adimit cum sit jus personale, nec in re tantummodo sed ad rem consequendam, ita nec sasina ex ea dissasitur, cum sit prorsus nulla & irrita utpote prædii de Domino directo tenendi: nam sasina prædii de aliquo tenendi inanis & sasina haud censetur, nisi is de quo tenendum est prædium vel per se vel per baliuum suum eam dederit; vel per alienantem dandæ vel prius datæ confirmatione sua consensum & auctoritatem accomodaverit.

Ex istis elucescit quanti momenti sit habilis agendi modus: ut enim apud Physicos tria rerum naturalium dicuntur esse principia, Materia Forma & Privatio; totidem etiam apud Jurisconsultos rerum agendarum statuuntur principia, Potestas scilicet Voluntas & Modus: sine potestate velle vel conari dementia est: sine voluntate potestas iners, nec in actum sese exserit: si adsit utraque tam potestas quam voluntas etiam enixa, desit autem modus habilis & ad actum explicandum idoneus, actus nullus & inefficax est. Forma enim & Modus (ut vulgo dicitur) dat esse rei: Et haud fieri, & haud rite & debito modo fieri, paria sunt: Cum igitur acquirens omisso modo acquirendi per resignationem, quæ resignatione facta, tam alienanti quam alteri, tum alienandi tum acquirendi potestas prariperetur, istum per confirmationem maluerit; in eum quadrat (quod multis aliis casibus locum habet) illud Brocardicum, Quod potuit noluit, quod voluit facere nequivit.

*Investitura.*

*Investitura est vel propria vel abusiva, per illam possessio vacua in accipientem transit; per hanc haud transit, nec enim in possessionis substantia sed in signo & praxambulo quodam consistit. Jus fluviat. p. 737. n. 77.*

*Jura complexa.*

*Jura complexa as Escheats single, Societies for certain Years, do these fall under Executry? Ratio Dubitandi, The subjects are mobilia: Contra, they are not liquid and cannot be valued, so that there can be no appretiation or male appretiation.*

*Juramentum.*

*Juramentum sortitur naturam, & conditiones contractus cui adjicitur, & intelligitur rebus in eodem statu permanentibus. Thef. Befold. verbo E. hegelubd. p. 207.*

*Jurisd'ctio.*

*Moribus Jurisd'ctio non datur Jure Magistratus sed in agris consistit, ab iis inseparabilis sicut servitus in gleba, & sigillum in cera: & est super territorium prout nebula super paludem, per potentiam activam.*

*Proinde si territorium dividatur, minime Jurisd'ctio separatur, sed una cum partibus dimembratur. Thef. Befold. Litera L. p. 547.*

*Jurisd'ctio Camere Imperialis.*

*ANCesaris morte, Jurisd'ctio Camera Imperialis expiret, vel sit in Suspensio? Befold. Thef. verbo Camergericht. 136.*

*Jus accrescendi.*

*When a Sum of Money is payable to a Widow in Liferent, and to the Children of her late Marriage in Fee: Quæritur, If any of the Children should de cease, Whether their part will accresce to the Survivers? or if they must be Executors or Heirs to the Child de ceased? Ratio Dubitandi, That the Fee is not given to individuals nominatim, but to Bairns & Liberis; and before it be declared that they have Right as Liberi and so the Fee established in their person, they are de ceased; and therefore locus est Juri accrescendi: as in the case of Heirs Portioners before they be served Heirs, if some of them de cease, their Right will accresce to the Survivers.*

*Jus Mariti.*

*Marriage being dissolved within Year and Day, by our Custom the Husband has neither Tocher nor any other Benefire by the Law*



as Courtesy: Neither the Wife, if she survive, will have Jointure or Terce, if there be no Children. *Quæritur*, if the Husband has not *Jus Mariti* as to Moveables, whether Extant or consumed? *Ratio Dubitandi*. These other Provisions are presumed to be in respect of a Marriage durable and standing, at least for the said space; whereas the Right fore said is founded upon the Relation of *Maritus*; & *ipso momento* that he was Married he was Husband: But it seemeth, that being the Wife would not have *Jus Relictæ* by the Death of her Husband, he should not have *Jus Mariti*; *ne Societas iniqua & Leonina sit*: But as to *bona consumpta*, it seemeth that *fecit sua*, being *bona fide* Possessor.

If a Husband lying at the Horn, and being thereafter relaxed, will lose only the Mails and Duties of his Wifes Lands resting before and becoming due during Rebellion? Or if his *Jus Mariti* and Right to these Mails and Duties, during the Marriage, will fall entirely; being he might Assign his *Jus Mariti*, and his Right not being during Life he is in the case of an Assigney to a Liferent, which falleth under the Assigneys single Escheat?

If a Provision in a Contract of Marriage with a Widow (having given a Tocher) that her Husband shall not have *Jus Mariti* to a certain Sum, nor to any other Sum except the Tocher (specially she having diverse Children of her first Marriage) be not valid? *Lady Red-house*.

A Bond being conceived in favours of a Woman conditionally, who thereafter Marrieth, and dieth before the condition exist: *Quæritur*, If the Husband will have Right *Jure Mariti*? *Answer*, he will; *per Legem quæ Legata. ff. de Reg. Juris*.

*Quid Juris*, As to conditional Legacies, if the condition exist after the Husbands Death, if they will belong to her self? *Vide* the said Rule and the reason of the Difference.

If his *Jus Mariti* may be Comprysed? And if it may, whether the said Right will fall under the single Escheat of the Compryser?

If a Husband be Forefaulted; *Quæritur*, If his *Jus Mariti* falleth under the Forefaulture? *Ratio Dubitandi*. The Husband has *Jus Mariti*, upon pretence and in order to Administration; and the Law presumeth that he will Administrate as he ought: and the Relation and *Jus Mariti* *heret ossibus* and is personal.

There being a Provision in a Contract of Marriage; that the Woman should be excluded from any Interest in Terce or third of any other part of Moveables; so that the Terce is no Communion as to her; *Quæritur*, If notwithstanding there will be Communion as to the Husband, so that he will have *Jus Mariti*, as to any Moveable Estate belonging to his Wife?

A Woman having Right to an heretable sum, if Diligence and charges be used for payment, *Quæritur*, If *ipso Jure* it becomes moveable, so that the Husband has thereafter Right *Jure mariti*? *Answer*, It is thought that, as to the Decision of this question, much will depend upon circumstances; and if diligence be used in order only to secure the Sum, and that the Debtor be suspect, the Sum will be still heretable: specially if adjudication follow in favours of the wife and her Heirs.

*Quæritur*, If a Provision in a Contract of Marriage, that the wife should retain a Right of sums belonging to her, and that she may dispose of the same without consent of her Husband, be valid and to be sustained? *Answer*

*Affirmative*, ſeing ſuch pactions are not *contra bonos mores* or *jus gentium*; But on the contrare, are conform to the Roman Law: and when any advantage is introduced in favours of a Husband, or any Perſon *jure poſitivo* or *municipali*, they may renounce the ſame. Mr. John Arthur.

*Queritur*, If the Husband be Lyable to the Wifes debts & *quatenus*? *Answer*. It is thought, he ſhould be Lyable; *quia penes quem Emolumentum, penes eum onus*; But it is thought he ſhould be Lyable only *quatenus Locupletior*, and according to his intromiſſion and as a Tutor, the Wife being in *Tutela mariti*: and though he has Right *jure mariti & Communione*, to that which belongs to his Wife, that ſhould be underſtood *Debitis Deductis*.

If, after the Marriage is diſſolved, it be found that there was a Debt belonging to the Wife during the Marriage, *Queritur*, If the ſame will belong to the Husband ſurviving, *Jure Mariti*? *Answer*, It is thought, The Law gives what belongs to the Wife, to the Husband as Adminiſtrator; And the Law preſumes that he Adminiſters behoovefully: But if a moveable Debt was not known the time of the Marriage, and is yet due, there may be ſome Queſtion; and yet it is thought, that it ſhould fall under the Communione.

If the Wife be provided in ſatisfaction of Terce or Third; *Queritur*, In that Caſe, If ſuch a Bond will fall under Communione, or if it will belong to the Husband *Jure Mariti*? *Cogitandum*.

### *Jus Mariti & Relictæ.*

**I**F the loſs ariſeing by the act of Parliament anent *Unlawful Ordinations and Marriages*, be underſtood to be a Privation; ſo that ſuch Rights ceaſe as if they were not Married; *amittuntur, non commutantur*: and the wife and Husband have Right to their own eſtate, free of *jus mariti & relictæ*, as if they were not Married? *Lady Aitoun*.

### *Jus Relictæ.*

**A** Woman, by contract of Marriage being provided to a Liferent of all that ſhould be Conqueſt, whether Lands, Sums, or Goods, *Queritur*, If ſhe will have Right to the half or third of the moveables *jure relictæ*? or if *eo ipſo* that ſhe is provided to, and accepteth a Liferent; it appeareth that ſhe renounceth her Communione? Whereas on the other part, that provision being in her favours, and ſhe not being excluded; it ſeemeth ſhe and her Executors ſhould not be excluded by it.

If the Husband may, by Donations in *Lige poſſie*, prejudice the wife and bairns of their part? *Answer*, the nature of the Gifts is to be conſidered, if they be ſo *immodice & inafficioſe*, as it may be preſumed, they are given of purpoſe to frustrate them.

### *Jus Superveniens.*

**I**F a Perſon having no Right to Lands ſhould diſpoſe the ſame, ſo that the acquirer ſhould be infeſt upon his Reſignation; and there after the diſpoſer ſhould acquire the ſame, and being infeſt upon the reſignation of the Heretor, ſhould diſpoſe and reſigne in favours of another for onerous cauſes,

causes so that he should be infeft: *Queritur*, which of these, who acquired these Lands, from the same author will, be preferred?

That Brocard *Jus Superveniens &c.* will it hold in the case, where the Right is supervenient not to the disponent, but to his heirs? or where the Heir to the Disponent had Right himself the time of the disposition?

*Queritur, quo casu Jus Superveniens accrescit?* And if it should be understood of the Right only of moveables, and such things as may be transmitted without infeftment? And not of Lands and others, which cannot *habili modo* be conveyed, much less accresce, without Infeftment?

### Justice-General.

**I**F the Justice-General may be Judge to Ryots, or any Crime or Delict, whereof the pain is not defined by Law, but left arbitrary?

## K.

### Nearest of Kin.

**T**HE Interest of the nearest of Kin is, that they may be confirmed Executors, and if they die before confirmation they do not transmit: and yet if the Testament be confirmed by any person, *nascentur actio* against the executor, who is Lyable to the nearest of kin which they transmit.

There being three persons who are nearest of kin to a Defunct, and the edict is moved and served at the instance of the Procurator-fiscal, and two confirmed only: whether will the third have action against the other two as nearest of kin for a part? *Ratio Dubitandi*. That these who are executors of Law cannot have Right *de facto*; unless they confirm; that being *modus adeundi in mobilibus*: and the nearest of kin by the act of Parliament has only an action in the case where he cannot *adire*, there being executors nominate and confirmed who have Right to the office and a third part so that the nearest of kin may pursue for the rest.

When the nearest of kin have action against the Executor Nominate, if some of them decease before confirmation, whether will they transmit the forsaide action? *Ratio Dubitandi*, it is not *Officium* but *Jus legitimum*, which may be transmitted, as the relicts part and bairns part, without respect to the confirmation: and on the other part, it may seem, that seeing they did not intent action before their decease, they do not transmit; and in such cases the intenting of action is *instar aditionis*, and there is no representation in moveables.

There being two Daughters, of which one, being Married, by her Contract of Marriage accepts her Tocher, in satisfaction of what she could Pretend to by the decease of her Father and Mother, *Queritur*, the Father having survived the Mother, whether will the other Sister have entirely her Mothers part as nearest of kin to her? *Ratio Dubitandi*, The other had renounced: And on the other part the Mothers part did entirely belong



to her self and to her nearest of kin: and the said sister that renounced is also near to her Mother as the other? *Vide Renunciation, Litera R,*

## K I N G.

**I**F the King take burden, in a Discharge granted by a Minor, that he shall ratify at perfect age, *Quaritur*, whether the Kings successors will be lyable representing their predecessors? *Ratio dubitandi*, The King succeeds not as Heir but *Jure Corona*: as in the case of single incorporations, V: G: Bishops, who are said to be successors, and are not Lyable to the debts of their predecessors, or in the case of *feuda ex pacto & providentia*? *Cogitandum*. *Earl of Tweeddale and Duke and Dutcheſs of Monmouth.*

If the King be in the case of other Minors? So that a revocation is not sufficient, unless a reduction be intended *Debito tempore, intra quadriennium utile*?

## King and Prince.

**I**F the King and Prince be to be considered as incorporate, so that these who succeed are in the case of successors of Church-men, and do not succeed by Inheritance, but by succession?

## L.

## Laudimium.

**L**audimium debetur Usufructuario, non Proprietario. *Theſ. Beldi verbo Handlohm. P. 359. versus finem.*  
**L**icet Dominus directus, post alienationem ab Emphyteuto factam, novum possessorem investiat, nulla facta mentione Laudimij aut ab eo censum recipiat, tamen suo juri non censetur renunciare, sed Laudimij integram exactionem habet, nisi expresse donaverit, *ibid. p. 360. sect. 2.*

**L**audimium nondum exactum connumeratur inter fructus pendentes: & si Emphyteusis pertinet ad parochum, illud non exactum, ad hæredes hand transmittitur; sed cedit ei qui in beneficio succedit. *ibidem.*

## Lawburrows for Burghs.

**I**F a Burgh be Lyable to find Lawburrows for their Burgesſes? *The Lord, Thesaurer-Deput.*

## In Lecto.

**I**F in Lecto, a Person, having children, may marrie their Mother, in order to their Legitimation, in prejudice of his Heirs?

If after a criminal and capital sentence, a person condemned be in Legitima

*tima potestate?* Seing he cannot be said to be *in Lēto*, and the Sentence doth not affect *immobilia*.

If a man on death-bed be accessory to Treason, whether will his Estate forefault in prejudice of his Heir? *It seemeth*, that though *in Lēto* Lands cannot be sold or annailized any way in prejudice of the Heir, that being only the case of the old Law of deeds *in Lēto*: Yet consequentially a man on death-bed may do many deeds in prejudice of the Heir, and a Traitor on death-bed may be taken out and punished.

If a Band being heretable, may be made moveable of purpose *in Lēto*?  
*Executors of Colonell Mathison. George Hadden.*

If an infestment be given, of Lands holden Ward, upon the resignation of the Father *in Lēto*; and a reversion apart to the Father to redeem upon a Rose-noble; *Quaritur*, if the Ward and Marriage be cut off? *Answer.* if the Lands hold of a Subject, *Sibi imputet* that he did not enquire and know the condition of the Disposer: But if they hold of the King, there may be some question; Seing the Kings Grants may be questioned upon Obreption or Subreption, and the negligence of his Officers should not prejudice him: and it appears the course forsaide, was taken of purpose to defraud the King of his casualties, being *in spe proxima*; and the disposer having Provided for himself that he should be master of his Estate by the Reversion forsaide: It is thought there is a Decision in the said case, in favours of the King which should be tryed.

A person on death-bed having made a Disposition in favours of a Creditor, but to the Prejudice of his other Creditors (The Defuncts whole estate being disposed in favours of the Creditor forsaide) *Quaritur*, If the Defunct could on death-bed prejudice his other creditors, and prefer one to all his other Creditors? Seing persons being on death-bed are not in *Lige Pontie* as to any deeds But the making of Testaments; and not as to deeds *inter vivos*; and if the Defunct in his Testament had made such a Conveyance in favours of a Creditor it could not have been sustained; and any deed done on death-bed is upon the matter but a Legacy or codicill: and a dying person should not be allowed to do any fraudulent deed; and it is a fraud where, there are many creditors, to give one the whole estate: and a person *in Lēto* cannot Prejudge his Heir; and *a fortiori* ought not to prejudice his creditors, who would be preferable to Heirs: and as in the case of comprysings within year and day all creditors should come in *pari passu*; So Dispositions on Death-bed ought to be to the behoof of all other creditors? *Cogitandum.*

A Defunct having on death-bed made a Disposition relating to a former and in corroboration of it did nominate two of his Name to succeed; *Quaritur* what will be the import and effect of it? *Answer.* It being on Death-bed it cannot have the effect of a Disposition unquestionable; but only of a declaration of the defuncts will, which ought to Determine (at least to have weight with) the friends.

If a person stricken with a Palsie, So that he cannot go abroad, but otherwise having sound Judgement and Memory; if after a considerable time he decease in that condition, will he be thought to be *in Lēto* after the contracting the Palsie? *Ratio Dubitandi*, That persons Paralytick cannot be said to have *morbis fonticus*; and diverse, after they have been so, have been able to do affairs and have had Children; and therefore it is thought,

that it is to be considered if there be a Complication of any other disease, of which it may be thought that he dyed; and from the time of the contracting that sickness he is to be esteemed to be *in Læto*.

What is the reason that a third party acquiring a Right made *in Læto*, though *bona fide* will be lyable to reduction?

### Legacies.

*Queritur*, If an universal Legacy, which upon the matter is a Testament and *ultima Voluntas de universitate Bonorum*, may be proven by the oath of the nearest of Kin? *Answer*. It is thought it may be so Proven; Seing *Scriptura* is not *de forma Legati*; and a Legacy not exceeding an hundred pounds may be proven by witnesses; and a Legacy exceeding that value is not probable by witnesses, not because That *Scriptum* is *de essentia*, but *ob fluxam fidem testium*: and therefore whatever value it be of, it may be proven by the oath of the nearest of Kin.

If a Person being named Executor and universal Legatar shall be forefaulted before he be confirmed, will his interest forefault to the King? *Ratio Dubitandi*. albeit a Legacy will forefault, yet in this case the Legacy being universal, and being subjoynd to the Nomination, is of the nature of Institution; which, being an office, does not forefault.

If a Legatar should commit Treason before the Testators decease, will his Legacy be void, as in the case of his decease? *Answer*, The Legatar not being *capax tempore mortis Testatoris*, having committed Treason, the Legacy is void.

If a Legatar doe not own the Legacy may a creditor affect the same? and if there be a difference betwixt the Legacy and a Donation? *vide Donatio non acceptata, in Litera D.*

### Conditional Legacies.

A Legacy being Left to an appearand heir, with that provision, that the Legatar should not question the Defuncts will, having disposed his estate both heretable and moveable to another, both by Disposition and testament: and a clause irritant being adjected to the Legacy, That the legatar should both not impugn, and should ratify the Defuncts deed; and should dispoise and convey any Right he had, in favours of the said other party; and if he failied or contraveened in either, that he should lose his legacy: *Queritur*, If the appearand heir should pursue an Exhibition *ad Deliberandum*, and being required should not be free to ratify and dispoise presently; whether the clause irritant be committed? *It is answered*, That the said legacy is not left in these terms, that if upon Deliberation having a time granted for that purpose, he should think it his interest rather to accept the legacy than to own his Right of succession, he should have the said legacy: But the samem is left in case he should cheerfully acquiesce to the Defuncts will, which he is obliged to do presently; being obliged to dispoise *Sine die*: & *ubi Dies non adjicitur presentis die debetur*.

### Legal



*Legal Reversion.*

**I**F a Minor have a Right to a legal reversion, as singular successor to the Debitor, *Quæritur*, If he will be in the same case as a Minor that is heir to the Debitor, so that he may redeem at any time before he be of the age of twentie five years? Or if there be a difference, upon that account that the Heir or his predecessor has Right *ab initio*; whereas the singular successor *Incidit in jus*; and the reversion being Limited by the Law in favours of the Creditor, it ought not to prorogate by the deed of the debitor *Hamilton of Wishaw.*

*Legatars and Intrometters.*

**I**F Legatars may pursue Intrometters, and if the Defenders will be heard to debate whether there be free Gear?

*De Legatis.*

**L**egata sunt Testamentorum appendices, & legatarii quodammodo hæredes. *Perez. Lib. 2. Tit. xx.*

*Legatum Rei alienæ.*

**Q**UÆRITUR If a person on Death-bed should name his appearand heir Executor; and should leave in Legacy to another an Heretable interest, or should otherwise dispoñe Lands; whether or not the Heir confirming the Testament may question the same as to the Legacy foresaid? But in this case the question will be, how far *Res aliena* (or such as is *aliena* as to the power of disposing the same *in Lecto*) may be Left? and Testaments being favorable, and the Intention of Testators being most to be considered, whether or not the Executor should redeem that which is Left in Legacy being Heretable, and be lyable in estimation and to the value thereof if it be *res aliena*? Or should satisfy the Legacy if it be *res sua* but Heretable, at least so far as the Executric will extend. *v. de Death-b d. Quæst. 2 & 3. Litera. D.*

*Res aliena si Legetur, non debetur nisi si veris Testator rem alienam esse; non enim præsumitur Legare voluisse si scripsisset rem alienam esse. Perez. Lib. 2. Tit. xx.*

*Incumbit autem Legatario probare Testatorem scripsisse rem esse alienam, nisi conjunctis personis Legata fuerit: pro quibus præsumitur ex affectu eum Legaturum fuisse etiam si alienam, Perez. ibid.*

*Ubi Legatur res hæredis valet Legatum, nec refert si veris Testator, an non hæredis esse; facile enim præstetur nec redemptione opus est. Perez. ibidem. Dominium rei sue legata transit in Legatarium statim a morte Defuncti. Ibidem.*

*Legatum*

### Legatum a Legatario acquisitum, ante mortem Defuncti.

**S**I Legatarius, vivo testatore, rem Legatam consequutus est Titulo onerosa emptionis vel alio, hæres tenetur solvere pretium quod dederat Legatarius; nec enim censetur habere rem cui pretium abest; sin vero Legatarius eum adeptus est titulo Lucrativo, aliter dicendum est, nihilque ab hærede petere potest; nihil enim ei abest & duæ causæ Lucrativæ in unum hominem, & unam rem, concurrere non possunt. Ibidem. si ex duobus testamentis.

### Res eadem duobus Legata.

**C**Um eadem res pluribus Legatur conjunctim, singulis debetur in solidum sed concursu sunt partes; & ideo si unus defecerit, vel sprevit Legatum vel descessit vivo testatore Collegatarijs accrescit. Perez. Lib. 2. Tit. xx.

### Legitima Liberorum.

**M**Oribus nostris Primogenitus est Hæres ex asse; & in universum Jus immobilium; Terrarum scilicet & aliorum quæ immobilibus accensentur: nec minus ex mobilibus libat & præcipit mobilia hæreditaria, vulgo *Moveable Heirship*: Et apud Anglos *Heirloom*, optione permessa optimum quodque eligendi tam ex supellectile quam ex instrumentis rusticis, & militaribus Armis, Equis, aliisque ejusmodi; ut tam Domi quam Ruri ad colendum, & si opus fuerit ad militiam & profectio- nes tum in bello tum in pace utcunque sit instructus: reliqua autem mobilia sive res sive nomina, Marito & uxori & Viri liberis, etiam ex diversis Matrimoniis (si adhuc in Familia) communia sunt, deductis debitis, si Pater-familias obærat aut Debitor sit; nec enim aliter bona intelliguntur nisi ære alieno subducto: Ea communio licet sit inter conjuges & liberos habitu & spe; haud cedit tamen nec actu vim suam exerit, nisi Matrimonio dissoluto per alterius conjugis obitum: Matrimonio durante, rerum communium non solum Administratio sed Dominium est penes Maritum, & potestas disponendi haud aliter quam de suis: nec ut communio ista cedat, opperendum est ut conjux emoriatur & penitus fato defunctus sit, sed confestim ut mori incipit potestas illa Legitima (vulgo *Liege poustie*) desinit, & communio effectum sortiri incipit. Mori vero incipit, imo civiliter, pro mortuo habetur, postquam morbus invasit Lethalis & fonticus, qui cuique refagendæ impedimento sit; adeo ut nec domo proreptare possit, nec negotiis (uti solitus erat) superesse, eundo ad Templum aut Forum & loca publica ubi plerumque salus animæ & negotia procurantur: quamdiu enim animus Ergastulo corporis coer- cetur & ejus Ministerio & organis necessario utitur, vix fieri potest ut corpori ægro mens sana sit: Accedit, Quod ubi Cadaver ibi aquilæ, & moribundis adsunt & advolant plerumque (amici ut videri volunt sed) corvi & hæredipetæ, ut captent & eblandiantur aliquid; nec id difficile est: ægri siquidem tam corpore quam animo infirmo, & assiduis eorum (quorum opera tunc opus habent) officiis & Blanditiis impares & obnoxii, facile

“ facile dant & jactant quæ propediem sua haud futura sunt : ex eo tempore  
 “ igitur quo æger sese domi abdidit, nec amplius in propatulo, Foro aut Ec-  
 “ clesia sui copiam facit, licet ex morbo non decumbat lento fortasse eoque  
 “ magis periculoso, dicitur esse in *Lectō ægritudinis* & in extremis agere :  
 “ & alienatione Terrarum, aut rei alicujus hæreditariæ ei prorsus interdici-  
 “ tur : Et si fecus faxit aut alienarit, hæredi actionis rescissoriæ remedio  
 “ facile succurritur : Sic non sine summa ratione prospectum est hæredibus,  
 “ ne quid in eorum fraudem fieret a parentibus aut decessoribus in extremis,  
 “ cum sui parum compotes sunt : idque non semel cautum Jure veteri, quod  
 “ *Libris Majestatis* aliisque *Libris Juris* continetur ; iis *Elogium* illud, quod  
 “ *Libri Juris* nostri sint, haud negarunt Principes nostri ; nec immerito,  
 “ quod dictum velim pace viri Consultissimi *Cragii* iis paulo iniquioris :  
 “ Quemadmodum enim Virgilius aurum ex stercore colligit Ennii ; Juris  
 “ Studiosis ex *Libris* istis (& non tam stercore quam Juris nostri veteris sive  
 “ ruderibus sive Rudimentis) licet multa colligere aurea & scitu nec in-  
 “ amœna nec inutilia.

“ Sed moribus nostris & usu Fori (cum eadem subsit ratio) idem Jus intro-  
 “ ductum est in favorem Viduæ & Liberorum ; & ut plerumque ubi Jus deficit  
 “ Senatus supremus supplet instar Prætorum, ita ex æquitate accommodavit  
 “ remedium utile ne Legitimis suis fraudentur, nec liceat Patri familias in  
 “ *Lectō ægritudinis*, conjugis aut Liberorum, mobilium partes & Legitimas  
 “ imminuere, nedum abalienando penitus eripere : quin etiam in Matre-  
 “ familias præmoriante, ex communione ejus Legitima cedit statim eâ in  
 “ *Lectō ægritudinis* constitutâ ; nec ex eo tempore Marito, quam vis Domino  
 “ & in Legitima potestate permittitur aliquid facere in fraudem uxoris,  
 “ aut eorum qui in Jus ejus succedunt : multum autem interest, uter vir an  
 “ uxor præmoriatur ; viro enim superstite cum Liberis, ex obitu uxoris cedit  
 “ communio, & Legitima tantum uxori ejusque proximis & successoribus,  
 “ iis mobilium triente ceu quatuor uncis & partibus decisis : quæ supersunt  
 “ Bes, viz. Ceu octo uncis & partes adhuc communia sunt Patri & Liberis,  
 “ Sed ut superius dixi habitu tantum & spe ; fieri enim potest & saepe evenit,  
 “ ut Communio inanis sit, Liberis Patri præmorientibus, vel Patrimonio  
 “ acciso, vel aliquo casu defecto : ubi autem viro contingit in fata conce-  
 “ dere uxore & liberis relictis, communio cedit ad omnes effectus tam uxori  
 “ quam liberis ; adeo ut ex mobilibus triens uxori, alter triens accedat li-  
 “ beris, tertius Patri-familias relinquatur, de eo, nec ultra testari potest si  
 “ voluerit : si intestatus decesserit, suum trientem liberis relinquit ad instar  
 “ hæreditatis, adeundum Jure quasi hæreditario, sed hærede submoto & ex-  
 “ cluso : Liberi enim trientem Patris haud vindicant ut suum & Legiti-  
 “ mam, sed in eum succedunt, quasi hæredes in mobilibus modo solenni:  
 “ & hæredi legibus satis superque consultum est, cum solus hæres sit ex  
 “ affe in immobilibus, reliquis liberis præteritis & exclusis : Sin hæres e re-  
 “ suâ esse duxerit, hæreditate omisâ, inter liberos admitti & ex Patrimo-  
 “ nio paterno sive hæreditate & terris, sive mobilibus, æquo cum cæteris nec  
 “ ampliori Jure aut parte, Potiri ; id ei facile permittitur ; unicuique enim  
 “ licet renunciare Juri pro se introducto : nec minus hæres hæreditatem  
 “ adit, & in Terris (si quæ sunt) investiendus est, ut rerum hæreditaria-  
 “ rum Jus adeptus, Fratribus habili modo eas conferre & impertire possit.  
 “ sic collatione facta, defuncti Patrimonium, quod ad hæredem vel ad  
 “ liberos ut liberos, aut Executores, aut proximos cognatos pertineret, ab



“intestato ultra citraque inter hæredem & liberos communicatur. Testamento autem facto si ex liberis aliquis vel Executor vel Legatarius sit, quod ex Testamento consequitur haud tenetur conferre; nec enim id habet ut legitimam & ex dispositione Juris vel ut unus ex liberis, sed Testatoris voluntate & ut quilibet; verum cum penes hæredem sit optio, maturè & re integra debet eligere; si enim hæreditatem adeat purè nec testatus se velle conferre, vix postea aditur nec ad collationem admittitur, elegit enim nec eligenti licet variare.

“His altius positis & præmissis, uti par erat in materia usu quidem & moribus satis obvia, sed (quod sciam) in libris non satis enucleata, ex iis eliciendum, Quid Juris sit in ista specie facti.

“Diem obiit *Sempronius* sed intestatus, *Mavia* uxore superstite cum tribus liberis *Caio*, *Titio*, & *Publio*; Viduæ triens mobilium Jure relictæ (ut loquimur,) *Titio* & *Publio* alter triens cesserat ut Legitima & liberis, tertius etiam triens iis obigit sed ut executoribus & quasi hæredibus mobilium ab intestato; adierant etiam dati a Judicibus ad quos pertinet Testamentorum probatio & Executorum datio; sed *Caius* promogenitus cui delata erat hæreditas decessit hæreditate haud aditâ, eo forte peregre profecto aut aliter impedito; ejus morte ea ad *Titium* secundogenitum devenit & adita est: Contra *Titium* agebat *Publius* frater conditione ex causa ut restitueret quæ ex mobilibus, vel ut Executor, vel unus ex liberis nactus fuerat; cum res ad alium casum devenerat & eum a quo non potuisset incipere; quod ea habuerit causam & unicam fuisse quod hæres non fuerat sed unus ex liberis, & cum eo effectum evanuisse; cum nunc hæredem & integrâ & opimâ hæreditate locupletatum, eâ debere esse contentum; nec sine injuria aut invidia ex mobilibus aliquid libare aut retinere posse: & in Libro isto cujus mentio superius facta vetus reperitur Decisio. 1553. *Julii*, quâ contra hæredem Judicatum in causa *Alexandri Law* contra *Robertum Law*.

“Sed cum ista ex libris Curiz & Regestis Decisio haud promatur, sed ex compilatoris nescio ejus libro & notis, salvâ rerum Judicatarum Auctoritate quæ apud me magna est, integrum mihi esse reor ut in contrariam sententiam pronior sim, iis adductis argumentis: Cessit siquidem Legitima liberorum ejusque semis ad *Titium* pertinens confestim a morte Patris; cedere autem tum Legitima tum Legatum dicitur cum actio pro iis competit; & ii, quibus Jus cessit, si decesserint antequam res ab eo sibi debitas consequantur, Jus tamen & actionem ad hæredes transmittunt. Ea autem est definitio Juris con-

*Theoph. lib.*  
*2. Titul. de*  
*Legatis. §.*  
*20.*  
*Theoph. eo-*  
*dem libro*  
*Instit. ti-*  
*tulo. 19. de*  
*hæredum*  
*qualitate &*  
*differentia*  
*§. 5.*

“summati & perfecte quæsit: Jus igitur, *Titio* ita quæsitum & in eo quasi fixum, quomodo avelli & ei eripi queat haud video: alia quidem est ratio defuncti (ut loquuntur) partis seu trientis, ejus semis ad *Titium* pertinebat ut unum ex proximis cognatis & executoribus; is a morte *Sempronii* statim *Titio* delatus est: haud cessit tamen ex eo tempore sed tunc demum cum *Titius* adiit, & Patri Executor datus est: Jura enim hæreditaria, vel quasi, quæ pertinent ad aliquem ut hæredem & successorem in alterius Jus universum, non cedunt nec quærentur nisi hæreditate adita; in mobilibus autem Executoris datio & confirmatio est instar additionis: utcumque enim suppositum sit *Titium* Executorem datum a iudice, defuncti triens cessit Executoribus & istius semis *Titio*, Jus adeo firmum & ad hæredes transiturum, si *Titius Caio* præmortuus fuisset, morte *Caii*

“inter

"intercidere & irritum fieri, a Jure & Ratione videtur alienum. Ad  
 "hæc mortuo Patre-familias, cum de patrimonio quæritur, an integrum  
 "& ex asse ad eum pertinuerit cœlibem forte & orbem, an vero commune  
 "fuerit uxori & liberis; Et quota uxoris & liberorum pars sit, utrum se-  
 "mis an triens; Et liberorum Legitima an ex asse unius sit; An si plures  
 "sint liberi in quot uncias & partes dividenda sit: Tempus mortis Patris-  
 "familias inspicit Lex, de futuro haud sollicita, nec quæ tunc sunt quoræ  
 "augeri aut minui possunt; quamvis Patrimonium rerum quæ in eo sunt  
 "interitu & fructuum & fœtuum accessione augeri potest & minui. Po-  
 "sito igitur Patrem-Familias decessisse testatum, relictis viduâ & liberis;  
 "viduam autem & liberos haud diu superstites fuisse morbo aut alio casu ex-  
 "tinctos; tamen Executor Patris-familias haud assem sed trientem tan-  
 "tum consequitur; licet tempore aditionis ceu confirmationis, nec liberi  
 "nec vidua extiterint; extiterant enim tempore obitus Testatoris & tunc  
 "partes fecerant; eæ autem semel quæsita eorum morte haud evanes-  
 "cunt, sed ad cognatos proximos & Executores transeunt. Posito etiam  
 "Patrem-familias mortuum, superstiti uxore & unico tantum filio præter  
 "hæredem, nec alios reliquisse liberos, filium autem secundo genitum im-  
 "puberem postea obiisse; fratre superstiti; eo casu ex patris mobilibus hæ-  
 "res trientem consequitur sed ut Executor fratris & ejus Legitimam; nec  
 "vidua aut Patris Executor audiendi si pro trientibus semisses petant, causa-  
 "ti rem ad alium casum devenisse, nec hæredem ex mobilibus aliquam  
 "partem carpere posse. Si *Objiciatur* in isto casu hæredem ex mobilibus  
 "nullam partem nancisci immediate & Jure suo, sed mediate & morte fra-  
 "tris, & ut ejus Executorem; In specie autem factide qua agitur *Titium*  
 "tum hæredem fuisse tum unum ex liberis, & suo Jure hæreditatem patris  
 "adiisse, nec minus ut unum ex liberis, Legitimæ liberorum semissem  
 "adeptum; Jura ista *adventitia* nec penes unum consistere aut retineri  
 "posse. Istud facile diluitur; tempus enim mortis *Sempronii* Patris-famili-  
 "as intuentum; eo autem tempore *Titius* erat unus ex liberis, nec hæres  
 "erat aut esse poterat, *Caio* primogenito superstiti; ei hæreditas morte  
 "patris delata, ad *Titium* haud immediate sed ex fratris morte pervenit;  
 "*Titio* quasi per surrogationem & *in ius patris* in locum primogeniti sub-  
 "eunte: Cum igitur *Titius*, eo quo Pater obiit momento, inter liberos fu-  
 "erit, & ipso Jure Legitimam nactus est, nec injuria retinet quod Jure ha-  
 "buit: Si *Caius* patris adiisset hæreditatem ei *Titius* hæres foret, nec  
 "minus sic patris hæreditate potius legitimam retineret: Quod autem  
 "*Caius* haud adierit, *Titio* nec imputandum nec officit: Patrimoniorum  
 "liquidem conditio, & Jura viduæ & liberorum, legibus constituuntur;  
 "nec æquum est ea ex arbitrio hæredis pendere aut ambulare. Porro hæ-  
 "reditatis delatio & Facultas adeundi, aliis casibus nedum hoc, haud pa-  
 "rum operatur; hærede enim perduelli & Majestatis reo, hæreditas etiam  
 "non adita amittitur & Fisco quæritur.

### *Legitimation per subsequens Matrimonium.*

**A** Person after his first Marriage, of which he had Children, having  
 Married again, and having diverse Children by the Woman Mar-  
 ried to him in that second Marriage, elder nor the first Children, which  
 are thereby legitimate: *Quæritur*, Whether the Eldest Son with the se-  
 cond

cond Wife, will be preferred to the Son of the first Marriage, as to the Right of Succession? *Ratio Dubitandi*, The first Marriage was Contracted Spe, and in contemplation that the Children of that Marriage would succeed, and the Eldest Son by his Birth had *Jus primogenituræ*, as the first Lawful Son, which could not thereafter be taken from him: & *e contra*, the Son of the second Marriage, the time of the Fathers Death, which is to be considered as to the question of the Succession, is his Eldest Lawful Son. *Cogitandum*.

If a Person may Marry on Death-bed, in order to the Legitimation of Natural Children, in prejudice of his Agnats, who would otherways succeed?

### Marriage and Legitimation.

**T**Here being a Declarator intented, to hear and see it found that the Children were Lawful; in respect there was a promise and Copula, *Queritur*, If the pursuit, being after the Fathers Decease, in order to the Succession to the Good-fire, the promise may be proven *prout de Jure*, as it might have been before? My Lord *Newton* told me, that after the Fathers decease it is found not probable by Witnesses. *Laird of Lauder*.

### Lenteratio.

**L**enteratio. vide Appellatio in Litera A.

### Libellarius Contractus.

**L**ibellus, sive Libellaria, est contractus, quo interveniente scriptura res immobilis venditur, certo pretio, certa insuper pensione in singulos annos; ea lege plerumque addita ut statim & conclusio tempore renovetur; denuo numerato pretio certo vel arbitrario. *Hering de molendin. q. 29. n. 4.*

*Est Italici usurpatio, & dicitur a scriptura & Libello, seu brevi charta. Ibidem. n. 6.*

### Liberi.

**I**n definito Liberorum nomine, censetur actum de natis tempore Contractus, non de nascituris. *Hering de molendin. quæst. 20. n. 19.*

### Liferenter.

**I**f a Liferenter of Lands Stock and Teind having Set the Lands to Tenants for a Duty for the Stock and drawing the Teind, and having deceased before *Martinmas* after drawing the Teind: *Queritur*, will she be Lyable to the Heir for the half of the Teind? *Ratio Dubitandi*. For the Heir; That she dying before *Martinmas*, he ought to have the half of that Years Duty: And for the Liferenter, that she had Right to the Teind after it was separate and collected, so that she might have disposed of it; and having gotten it, it cannot be taken from her; and that



the Legal terms are to be considered in the case of Debt, when *dies cedit*; but in this case *nihil debetur*, but she has Right to the Fruits Teinds, and Quota of them in the same manner as the Tennant, and as if she had laboured. *Vide Third and Teind. Letter T. Vide Titular. litera T. q. 2. vide Milns. Litera M.*

Where Grass Rouns are set for payment of a Silver Duty (by the Tennant entering at *Whitsunday*) the half at *Martinmas*, and the other half at *Whitesunday* thereafter; *Queritur*, If the Liferenter decease after *Martinmas*, whether the *Martinmas* Duty will belong to her Executor? *Ratio Dubitandi*, That the Duty payable by the Tennant, entering as said is, and going away at the next *Whitesunday* is payable in respect of the Cropt, and *proventus* of the next Year, either of Corns or *fectura animalium*; and it is without question that a Tennant paying a Silver Duty for a Corn-Roun, albeit he pay at *Martinmas* after his entry, yet it is payed for the next years Cropt; so that the Liferenter can pretend to no part thereof, deceasing the time foresaid: and on the other part, it appears that there may be a difference as to Grass Rouns, seing the half of the Duty seems to be payed for the profite of the Grass, from *Whitesunday* to *Martinmas*, which falls within the Liferenters Right.

*Queritur, Quid Juris*, As to Salt-pans and Milns if the Liferenter have the same in her own hand, whether her Right is presently determined by her Death?

The same being set to Tennants from *Candlemas* to *Candlemas*: If the Liferenter deceased after *Lambmas* and *Martimass*, will her Executors have any part of the Duty after *Lambmas*?

When Rentals are set in these terms, That beside the Rental Duty there should be every five Years a considerable Sum payed, as in *Contractu Libellario*; *Queritur*, If the Liferenter will have Right to that Sum, if it fall to be payed during the Liferent?

When the whole Estate of a Nobleman is Disposed reserving his Liferent, or of a Baron; will the Liferenter have Vote in Parliament, and Voice in the Election of Commissioners for Shires?

A Lady being Infeft upon her Contract of Marriage in Lands for her Liferent; *Queritur*, If Tacks set thereafter by her Husband will bind her? *Vide Terce quest. ultima.*

### *Executors of a Liferenter.*

**I**F a Woman deceaseth after *Whitesunday* before her Husband, will her Executors have Right to a part of the years Farms?

### *Liferents.*

**D**ies as to Liferents (when the question is betwixt the Executor of the Fiar and Liferenter) *cedit* at *Whitesunday* and *Martinmas* as the Legal Terms.

*Queritur*, If a Bond be, to a Man and his Wife the longest liver, payable at *Lambmas* and *Candlemas*; and the Husband deceasing after *Candlemas* will the Husbands Relict have Right to a half year at *Whitesunday*?

If a Father be Infeft in Liferent in Lands, and be content to renounce his Liferent in favours of his Son? *Quæritur*, If it be *habilis modus* to extinguish his Liferent? *Ratio Dubitandi*, He is the Superiors Vassal during his Life, and cannot cease to be Vassal without the Superiors consent, at least *sine refutatione*.

When a Vassal is Year and Day at the Horn, if he has granted a Right to be holden of himself, what will be the Import of his Liferent?

If a Liferenter do Dispose his Liferent of Lands; or if the same be Comprised from him, and thereafter he be Year and Day at the Horn: *Quæritur*, If the Superior will have Right to the Liferent, as if the said Right had not been granted? *Answer*. It is thought, he can have no other Right, than such as the Liferenter had, and affected with the said Right.

If the Liferenter be Forefaulted, will not the King have the Right of the said Liferent without the burden of the said Rights? And if it be so, *Quæ Ratio Discriminis*? *Answer*, The King will have Right to the said Liferent entire; and the reason of the Disparity is, that Treason is *Crimen feudale*, and when the Vassal Fiar or Liferenter doth Forefault, the Right cometh to the King *Pure*, and without any Burden but such as he has consented to; Whereas Horning is not *Delictum feudale* but *commune*: and the Liferent doth not belong to the Superior *Jure feudali*, but *Statuto*, so that he ought not to be in better case than the Rebel.

### *Quando Dies cedit as to Liferenters.*

**W**Hen Rent of Lands is Victual, the Heretor dying before *Whitesunday* the Liferenter has Right to the whole Year; if after *Whitesunday* but before *Martinmas*, The Relict has Right to the half; but if after *Martinmas* to no part, because *Whitesunday* and *Martinmas* are *Termini Legales* as to the question, *Quando dies cedit*. *Quæritur*, therefore, whether when Rent is all in Highland Rouns & *agris pascuis*, the custom being in some places that the Tennants entering at *Whitesunday*, payes the half of the Rent at *Martinmas* next; and the other half at *Whitesunday* thereafter, *Quid Juris* as to the Relict, the Husband dying after *Whitesunday* or after *Martinmas*?

The same Question is, If, in the Lowlands in Corn-Rouns, the Tenant and Master agree, that the Duty should be payed in Money by the Tennant entering at *Whitesunday*, the half at *Martinmas*, and the other half at *Whitesunday*?

### *Vassalus Ligius.*

**N**emo potest esse simul duorum *Vassalus Ligius*. Thef. Bef. litera L. p. 597. *ad finem*.

### *Limitation of Fees.*

**L**ands being Disposed to a person, and the Heirs Male descending of him; which Failzieing to the granter and his Heirs, *Quæritur*, If his forefards fall; what way will the Granter being Superior and his Heirs attain

attain to the Right, whether as Heir of Provision to the Vassal? or *per vi. am Consolidationis*, and by a Declarator that he has Right by the return foresaid; and that the Property is consolidate with the Superiority?

Whether he will be Lyable to the Vassals Debts? *Ratio Dubitandi*, The Vassal was Fiar and might Contract Debt, and whoever succeedeth to him ought to be Lyable thereto.

If the Right be granted to a Person, and the Heirs of his Body, without any further Provision or mention of return, whether will the King have Right as *ultimus hares*, or the Superior? *Answer*. The Fee not being simple but limited; It is thought, that the Superior should have Right being the Fee is limited. And the King cannot succeed but by way of Representation and as *hares ultimus*, and there can be no Transmision beyond the Limitation. But if the Lands be given to a Man and his Heirs whatsoever, the Fee is simple; and the Granter having simply and absolutely given away the same, he can pretend no Right to the same; and the King cometh under the generality of *Heirs whatsoever*, being *ultimus hares*.

### *Litiscontestation.*

**I**F Removings, Spuilzies, and Ejections, which are *interdicta possessoria* *Litiscontestatione perpetuentur for forty years, or only three?*

The same Question may be for Servants Fees, House-Mails, and such other Actions which prescribe in three years.

### *Quo casu Possessor in mala fide constituitur per Litiscontestationem & quando non?*

**L**itiscontestatio possessorem male fidei constituit, adeo ut ab eo Tempore; ad restitutionem fructuum teneatur: hoc tamen verum est in iis, qui per Litiscontestationem vere in mala fide constituuntur, veluti si res feudalis Emphyteutica petatur, aut vindicetur, ob feloniam commissam: aut quia tempus locationis transactum est veraque sit causa vindicationis, quam etiam possessor nec minus obstinate contendit.

Secus est, si ego rem emo ab eo cujus esse putabam, tu vero dicis eam ad te pertinere, & nihil adducis præter petitionem & nunciationem, tunc quia bonam fidem habeo, Litiscontestatio me non vera sed ficta efficit mala fidei possessorem; & a fructibus merito excusor, donec sententia feratur. Thef. Besold. in litera K. 48. verb. Kriegsbevestigung. Sect. pen. p. 478.

### *Locus Pœnitentiæ.*

**A**fter Articles of agreement are subscribed, of which one is, that they shall be extended in a Contract: *Queritur*, If there be *Locus pœnitentiæ*? *Ratio Dubitandi*, Because *antequam totum negotium in mundum sit redactum licet pœnitere* L. 17. Cod. de fide Instrumentorum.

An agreement being to be perfected in Writ, whereby one of the Parties was to be obliged to pay a Sum of Money; there was a Letter Written thereafter by that person, desiring that the Write may be drawn, and bearing



bearing that he should perform conform to the said agreement, *Queritur*; If he be bound by the said Letter, so that there is no *Locus penitentiae*?  
*Answer.* It is thought, that the bargain being to be perfected in Writ, and until then there being *locus penitentiae*, The Letter promising performance doth imply a condition. *Viz.* If the Write be perfected and subscribed: feing upon the drawing of Writes there may arise Questions which may hinder the perfecting of the same, & multa cadunt inrer calicem &c.

## M.

## Mare.

*M*are dicitur esse de districtu illius Civitatis. seu loci, qui confinit cum Mari: & habentes Jurisdictionem in territorio coherenti Mari, dicuntur habere Jurisdictionem in Mari intra centum milliaria. Jus Fluviat. p. 152. & 496. n. 23..

## Marriage.

**I**F the Superior Infeit the Appearand Heir being unmarried, doth he pass from the Marriage?

If Marriage be due, if the Appearand Heir be either *senex* or *valerudinary*? And either unfit or unwilling to Marry?

It seemeth *Celibate* is not *Delictum*, so that the Casualty thereby should arise to the Superior; but only the Marrying without the Superiors consent inferreth contempt, and consequently *Delictum* & *penam*?

If the Appearand Heir be Married in his Fathers time and have Children, and thereafter Marry after his Fathers decease, will a Marriage fall to the Superior?

If the Marriage of the Appearand Heir of Ward-Lands should be modified, with respect to the value of the Ward Lands, without consideration of his Debts? It appears that the Superior should not be in worse case by the Deed of his Vassal: and yet he may be in better, for if the Heir have beside a personal or other Estate, the Marriage will be modified to be such, as the Tocher to a Person of that Estate may be thought in probability to amount to.

If a Person holding of the King, and other Superiors *Respective*; of the King blensh, but of them Ward; may resign in the Kings hands to be holden Ward in *emulationem*, and of purpose to prejudice the other Superiors? *Salicotts.*

If Parties be Married publicly. *Queritur*, If it be notour that they are impotent, as if it may be proven that before the Marriage the Man was *castratus*; is it competent to the Heir or any other person concerned in the point of Interest (but the party prejudged) to question or dissolve the Marriage as null or *dirimendum*, upon that or any other Ground?

If a Marriage be unlawful; and either of the Parties be *in bona fide*, which

which doth legitimate the Children. *Quæritur*, If these Children will succeed with other Children of lawful Marriages, at least to their Parents?

If they will succeed to their other Kinsmen? or if the Legitimation will only import that they are not *Spurij*, and that they have *Testamenti facti- onem*?

If a marriage after Inhibition, may be reduced upon that ground?

What are the *Legitima Remedia* to compell parties to consummate marriage upon Contracts? Whether they may not only be decerned by the Commissars, but by the Church, under the pain of Ecclesiastick censure?

Where some Lands hold of the King Tax-ward, and others hold of him Simple ward, *Quæritur*, will he get both the simple Marriage and the tax? Sir John Cuninghame saith, it was decided in the case of *Innerness*, for both.

Marriage being dissolved within year and Day, whether the Gifts, and *Jocalia* given *hinc inde* may be repeated? *Item*, whether the gifts given by friends will fall under communion? So that the Maxim, that Marriage being dissolved within year and day is in the same condition as to all intents as if it had not been, Is only to be understood of *Dos & Donatio propter nuptias*.

If an old Woman *super annos*, and past the age of Marriage being about Threescore years, shall succeed in the Right of ward-Lands, whether Marriage will be due? *John Bonars Heir*

*Quid Juris* if a widow either man or woman, *inter annos nobiles* shall succeed to Ward-lands? *Barclay of Pearstoun*.

If a Person have only two acres, or a mean interest in Ward-lands, but a very great interest otherwise, Whether will his Marriage be considered with respect to his whole Estate?

Seeing the Marriage of appeirand Heirs belongs to the eldest Superiour, *Quæritur*, who shall be thought the eldest Superiour, whether the eldest as to the Lands, or as to the Vassal; and if it be to be considered, which of the Lands, was first given in Tennandry?

*Quid Juris* when a Marriage is fallen, but not declared nor gifted?

A Marriage being contracted betwixt a woman *Pubes*, and one that is *impubes*, *Quæritur*, If it be a Marriage, at least as to her, so that she cannot marry with another in the *interim* that he is not *pubes*? *Ratio Dubitandi*. That a Contract being mutual cannot Claudicate.

A Father, by his daughters Contract of Marriage, having disposed to her and the second Son of the Marriage, and the other Heirs therein mentioned his Estate, under Reversion and certain other Conditions; and in special if he should ordain a certain Sum should be payed by these who should succeed to the Estate, to his Daughter and her forsaids: and the said contract bearing also a Tocher of five Thousand pounds to be payed presently to the Husband: *Quæritur*, If the Marriage be dissolved within year and day without Children, whether the Contract will be ineffectual as to all intents, as being *causa data & non secuta cum effectu*? Or whether it be as to the Right of the person of the Daughter, either as to the Estate or as to the said Sum *ipso facto* void, at least reduceable? And whether she may repeat the Tocher from the Husbands Heirs? *Lady Testers contract of Marriage*, being dissolved within year and day.

A person being Heir to his Father in a great Estate holden blensh; And having a small piece of Land holding ward, which he may succeed to as Heir to his Father. *Queritur*, If notwithstanding he is Heir general and Heir in special in the Lands holden blensh, he needs not Enter to the saids ward Lands, in order to be free of a Marriage, which would be considered with respect to the whole Estate? *Ratio Dubitandi*. That being Heir as said is otherwise, he cannot refuse to be Heir of the said Lands. *Answer*. It is thought, that if he was charged to enter Heir in special at the instance of a creditor in special, he could not renounce: But the superior cannot urge him to Enter, but will have only the benefite of a Nonentry: Seing the said other Lands, and any interest he had as general Heir are *distincta patrimonialia* from ward Lands, and he may owne the one without the other.

If the superior may affect and evict the said ward Lands by adjudication, for the Marriage of the appearand Heir, considered with respect to his other Estate, in prejudice not only of the appearand Heir, but of any who should thereafter be appearand Heirs? *Ratio Dubitandi*, That the Marriage being but a Casualty may exceed more than the double of the value of the Lands, which is absurd. *Cogitandum*.

If the appearand Heir will notwithstanding be lyable to the Marriage, albeit he doth not enter nor renounce to be Heir, as to these Lands? *Ratio Dubitandi*. That *Refutatio* of vassals is not admitted, unless they satisfy the casualties already fallen. *Answer*. It is thought, he may renounce and be free of the casualties personally; without prejudice to the superior to affect the Ground: and the case is different from that of vassals infest, Seing they having accepted the Right they cannot offer to renounce, unless they pay what was formerly due to the superior, being *fructus Domini*; whereunto not only the Ground but they are lyable personally, by reason of their Right and possession, and it cannot be said that the appearand Heir, has either. *Mortounhall*.

There being diverse Adjudications of Land holding ward within year and day, but Infestment only upon one; and that adjudication whereupon Infestment is, being before the debtors decease, and therefore stopping the Ward; and the rest after but within year and day of the first Infestment, *Queritur*, If the first be satisfied by intromission, may the superior claim the Ward of the appearand Heir of the Debtor being Minor, in respect the act of Parliament *Debitor and Creditor* doth relate only to the interest and competition of creditors, and doth not prejudice superiors of their Right and casualties; and the adjudger Infest is only vassal; and the other adjudgers are not vassals; and by them the superior can have no casualty either of Liferent, Ward, or Marriage? *Cogitandum*. *L. Bancreiff*.

When diverse Lands are holden of the King, some in simple Ward and others Tax as to the Ward and Marriage, *Queritur*, when the Marriage falls, whether the King will have both the simple Marriage and the tax Marriage? *Answer*. That since at one time there can be but one Marriage, there can be but one Casualty for the same: and as the King would have but one Marriage, albeit there be diverse Lands holden ward of him simple Ward; So in the case foresaid, where there are some tax, he cannot have two Marriages; and the tax being only *estimatio*, where there can be no Marriage there can be no Tax due: The same question may be of Lands holden simple and Tax-Ward of a Subject.



A person being charged with Precepts out of the Chancery to Enter a person presented upon forefaulture, and in respect of his Contumacy the person presented being Infeft upon a Precept out of the Chancery and thereafter deceasing. *Queritur*, the Lands holding Ward, whether the Marriage of the appearand Heir will belong to the King or to the Superior? *Ratio Dubitandi*. That the Superior not having owned the defunct to be his vassal, he cannot claim the Marriage of his Heir: and on the other Part The King is not Superior, and grant only Infeftment in *Subsidium*: and doth what the Superior without reason refused to do: and there is a great difference betwixt the case foresaid, and that, when the Superior not being Infeft himself is therefore charged to Enter, with certification to Lose the Superiority during his Life; Because in the first case, there is no contempt of the Superior, but a wrong done to the person who would enter being a stranger to the Superior not being formerly his vassal: and in the other case there is both a wrong to his own vassal, and a contempt of his own Superior that he is in non-entry; and the more aggravated, that being charged to enter he continues in non-entry; and the act of Parliament therefore provides that he should Lose the Superiority.

It is informed by *James Hay*, That the Lords have lately found, That when Lands are holden some simple-Ward and some taxt, both the single and taxt Marriage will be due: The President being of another opinion.

If a Superior Infeft his Vassal being Minor, before the Marriage fall by his attaining to the age of fourteen years, may he claim the Marriage after it falleth?

If he Infeft him after the Marriage has fallen, whether doth he pass from the Marriage?

### *Marriage Clandestine.*

BY the act of Parliament *anent unlawful Ordinations*, these who are so Married amitting *jus mariti & relictae*, *Queritur*, If the Husband Lose his Curiality or the woman her Terce? Or only *jus mariti* as to the Communion of moveables; Acts Specially penal being *stricti juris*, and there being, beside, other pains?

If *Clandestina Nuptia* without consent of Parents, though they bind the parties so that they cannot Marry with any other, yet will be null as to Parents and friends, that the Children cannot succeed to them against their will?

### *Materna Maternis.*

IF in no case that *Maxime Materna Maternis* has place with us? And in special (in that *viz.*) if a Person succeed to his Mother and de cease without Heirs upon the Fathers side, will the Fisk exclude the Mothers friends, the Estate being *profectitious* and descended from her?

In *Allodialibus* there is no succession of the Mother or her friends *active*; but in *feudis famineis*, if a Son should succeed to his Mother, and should thereafter Die; *Queritur*, whether his Heirs upon the Fathers side would succeed

succeed to such Lands, or his Mothers Heirs? *Ratio Dubitandi* That the said Lands are given *ab initio, primo investito* and his Heirs, which must be understood *heredes Sanguinis*: and the son having succeeded to his Mother, his Heirs upon the Fathers side cannot be thought to be Heirs either to her or her predecessors: and therefore in that case it is to be thought, that the Rule should have place *Materna maternis*: and there is the like reason in *Patents of Honour* being *quasi feuda*; and being granted by the King to the receiver of the Patent and his Heirs.

A Person, as said is, being infeft in Lands as Heir to his Mother, and dying without issue: whether will his nearest Kinsman upon the Fathers side or Mothers side succeed to him in the said Lands? *Ratio Dubitandi*, That by our custom the Fathers friends are alwayes preferable; and that Rule *Paterna Paternis & Materna Maternis* has no place: and yet it is thought that in *mobilibus*, when a person has Right to the same as Executor to his Mother they go to the nearest of Kin upon the Fathers side; Because there is no *affectio* as to *mobilis*, and there is no Limitation or Destination of Heirs as to these; But as to Lands, when the Right is taken to a man and his Heirs, and a woman succeeds to the said Lands, and thereafter her son as Heir to her, if the son die without issue, his Mothers Heirs ought to succeed: Seing by the Infeftment no person can succeed but he that is Heir of blood to the person first infeft, either immediately or mediately.

*Quid Juris*, as to Bands for Sums of money? *Answer*. It appears, that there is *eadem Ratio*, Seing there is in bands *Limitatio heredum*.

### Matrimonium

“*S*ola nuptialis benedictio & solennis & publicus in Ecclesia benedicendi ritus, vera est Matrimonii apud Christianos executio; ex quo tempore jura Matrimonii vigorem suum obtinent, Licet concubitus non fuerit secutus. *Christenius de jure Matrimon. Differ. 1. quæst. 1.*

“Si post sponsalia pura, concubitus accesserit, & sponsa conceperit, sponsus vero ante confirmationem diem obierit; de jure, partus non est Legitimus, quia non est ex justis nuptiis. *Idem eadem differ. Quæst. 2.*

“Isto casu licet interdum Sponsalia habeantur pro Matrimonio, illud locum habet solummodo, quoad vinculum mutue promissionis, ne illud temere solvatur, non quoad reliquos Matrimonii effectus. *Idem. eadem. diss.*

“Jure Civili, Divino, & Canonico, non aliter Legitimum est Matrimonium quam si Parentes consentiant; nec minus Matris quam Patris consensus requiritur, præsertim mortuo Patre.

“Non interest, utrum consensus sit expressus an tacitus; paria enim sunt consentire & non contradicere. *Idem de sponsalibus. Diss. 1. quæst. 3. p. 17. & 18.*

“Parentibus non permittitur Matrimonium impedire, si id fiat injuria; & cum causa sit cognoscenda, Statutis quarundam Civitatum, cautum est parentes isto casu ad Judices Ecclesiasticos seu Commissarios causarum Ecclesiasticarum esse citandos; & si Liberi sint minores viginti quinque annis, non tenentur parentes rationes sui Dissensus proferre; sin Liberi annum vigesimum quintum expleverint, Parentum oppositio non aliter locum habet, quam si justas Dissensus causas proferant. *Ibid. P. 19.*

“Si

"Si Titia ea conditione Legetur, si arbitrato Seij nupserit, habetur pro non adjecta, & debetur Legatum licet conditioni non pareatur. *Christen: de spons. quæst.* 17.

"Si ad sponsalia clandestina, quæ consensu Parentum carent, concubitus accesserit, non confirmatur Matrimonium, si parentibus iustæ causæ sint dissensus: hæc sententia curijs Holland: placuit. *idem quæst.* 20.

### Mensis.

"SI Mensis simpliciter proferatur, intelligitur de mense solari & Duodecima parte anni, vel triginta Diebus. *Thef. Bes. in Litera M.* 68.

"verbo Monat. p. 664.

### Mensura Taxative & Demonstrative.

"INTEREST utrum Mensura in venditionibus Taxative, an vero Demonstrative adjiciatur: illud fit cum ab ipsa mensura contractus initium sumit, hoc cum a corpore. *Jus fluviat*, P. 810. n. 58.

### Militia.

THE Gentlemen that went out in a Troup in the late Expedition, having been at Charges for a Banner, Trumpet, and Coat, &c. *Quæritur*, If the said Charges may be laid upon the whole Shire? *Answer Negative*, Seing the *Militia-Horse* did not go out; and it was *munus Personale* upon the Heretors within age to go out.

### Miln.

A Defunct being in Possession of a Miln being a Horse-miln; whether will the said horse and other *instrumenta mobilia* that are in the Miln, belong to the Heir?

*Quid Juris* as to Milns when they are either sett to Tennants or possessed by Liferenters *quoad* the duties of the year wherein the Liferenter dyes? *vide Liferenter Litera L.* and the like cases of *Third and Teynd and Titular*, *Litera T.*

### Ministers Stipends in a Reddendo.

IN Infeftments of Erection, the *Reddendo* is ordinarily a blensh Dutie, and beside to Pay to the Minister the stipend therein mentioned *Quæritur*, whether the stipend be *Debitum fundi*? *Ratio Dubitandi*, That what is due upon the *Reddendo* not relating to Lands, but to Teinds which are not *fundus & subjectum permanens*, But a Benefit arising out of the Lands; such a *Reddendo non afficit fundum*; no more than Teinds and a valued dutie.

### Minor.

WILL the Heir of a Minor be restored upon that ground, That the Lands being Entailed he resigned in favours of the Heirs whatsoever? There being no Lesion to the Minor.



*Minor non tenetur Placitare.*

**M**inor non tenetur placitare holds not, *ubi agitur de Dolo, culpa vel obligatione Defuncti*, as in Recognitions, Forefaultures, &c. *Granburn contra Lady Carnegy. Humby contra his Neice.*

*Reduction upon minority.*

**L**ands being disposed to a Minor, and after his perfect age the Bargain being questioned as being to his prejudice, in so far as the same was for Eighteen years purchase and a half, & the same might have been bought at Seventeen according to the rate of the times. *Quæritur*, If such Lesion not being Enorm (and *modica*) be relevant? *Ratio Dubitandi*, The defender contracted *bona fide* with a Tutor the pupill's Father, and *Licet Contrahentibus se invicem decipere*, and *non constat* notourly, That that was the rate; and some of the witnesses declare the contrary; and the defender will get a Buyer at the same rate. *Tweeddale contra Drumelzier. vide Annualrent for Damage, Litera A.*

*Decreet against Minors.*

**I**f a Decreet against *Minores indefensos*, no Curators being called in special but in general at the mercat Cross if they have any for their interest, be null? *Ratio Dubitandi*, *Gesta cum adultis non habentibus Curatores* are not void: and on the other part, by the common Law *Datur Curator ad Litem*, & *Minor non habet personam standi in Judicio*; & *lata Contra Minores indefensos sententia, non Tenet*. L. 45. § 2. ff. de re judicata. *vide Perex. Institut. Lib. 1. de Curatoribus. § Dantur in invitis.*

*Mobilia.*

**I**f *Mobilia* has *Situm*, when they are here *animo & destinatione Domini*; so that when they belong *v. g.* to Englishmen they are to be thought *Res Scotticæ* and to be affected with the Laws of Scotland; and he cannot dispose of them by a nuncupative Will. And *e Contra*, If he should change their *situm*, and transport them to stay in England?

*Mobilium vilior possessio.*

**M**obilium vilior & abjectior est possessio & facilius acquiritur & amittitur, quam immobilium; in ea non cadit tanta affectio: non est Locus in ijs re-  
adhibitioni Gentilitiæ sive juri præcipuus. *Hering. de molend. quæst 8. n. 58. & sequent.*

*Mobilia sequuntur conditionem personæ sive Domini, adeo ut ejus offibus adæquant active & passive: Immobilia autem co-hærent Territorio.*

*Modus babilis.*

**I**F a person haveing Right to Lands (wherein another is infest and in Possession, so that he has the benefit of a possessory Judgment) should dispoise his Right, which is preferable in favours of the said party who is infest and in Possession as said is; and thereafter another person upon a posterior disposition should compleat his Right by Infestment: whether or not will the said prior Right at least Extend to and import a discharge of the action of reduction, and militate against the singular successor?

If a Reduction being intended, the pursuer judicially Declare that he passes *Simpliciter* from the said action, will that barr a singular successor; Seing the said Declaration is upon record, whereas in the case above mentioned the disposition is a Latent deed, which cannot prejudice a singular successor?

If at least if it were Registrate in the register of feassins, it would prejudice; being none of the Writs appointed to be registrat therein?

*Molendinum.*

**N**on licet molendinum exstruere in flumine publico, sine Principis consensu. Frits: Jus fluviatile p. 10. n. 128.

*Molendina aquatica.*

**M**olendina igitur aquatica sunt de Regalibus. Idem p. 13. n. 175.

*Molendina Bannaria.*

**M**olendina bannaria sunt, ad qua integra Communitates vel Pagi precise ire coguntur. Jus Fluvial. 1225 versus finem.

Quæ appellatio inde videtur sumere originem, quia Bannire apud veteres Germanos idem significat quod Sancire, Jubere, Edicere. Hering. de Molend. q. 11. n. 2, & 3.

*Molendina navalia Immobilibus accensentur.*

**M**olendina navalia pro immobilibus habenda sunt. Hering de Molendinis q. 8. n. 26. quia ædificans ea intentione & destinatione ea extruit, ut semper & perpetuo non pro motu sed pro molitura in ipso flumine manerent; nec idem & molendinum aquaticum perpetuæ moræ causa ad ripam exædificatum, plus præstare potest quam Molendinum navale; nec in illo quidquam nominari potest quod huic non inest, rotæ molares & cætera omnia. idem q. 8. 26. & sequen. Ea destinatio & attributio ad molendum, molendinum immobile reddit.

*Molendina Πνευματικη*

**M**olendina Πνευματικη alata, seu vento agitata, immobilibus accensentur: Idem eadem. quæst. n. 40.

*Distictu,*

*Districtus Molendini.*

“**V**Enditâ moletrina, licet non fiat mentio districtus, id est, jus cogendi subditos molitoris ad molendum, venit tamen; quia simplex rei alienatio pertinentias rei continet. *Jus Fluviat. p. 1229. n. 31.*

*Quomodo qui sunt in districtu Molendini  
cogi queant?*

“**E**tiam si is qui emit Molendinum, non posset Jurisdictionaliter cogere Rusticos inhabitantes in districtu Molendini; potest tamen eos cogere per actionem, per manus injectionem in frumenta & fruges Molendas. *Hering. de Molendin. q. 11. n. 145.*

*An qui sunt in Districtu alibi molere possint?*

“**S**ubditi in aliis Molendinis molere possunt si Dominus Molendini non procuret eorum grana in mola sua bannaria contundi intra spatium viginti quatuor horarum. *Idem quæst. 11. 139. & alii ibi ab eo laudati.*

*An Extrui possit Molendinum quod noceat vicino?*

“**S**uperioris Molendini Dominus prohibere non potest, ne in inferiori loco alius Molendinum extruat, tametsi ex eo futurum sit ut superioris redditus diminuatur; quia ex eo quod quis suo Jure facit, teneri non potest, licet alteri per consequentiam noceatur: distinguendum est, quare ratione superiori vicino noceatur, nam si ob id solum quod minus frequens sit Superioris Molendini commercium prohibendus non est, cum suam posset quisque conditionem Meliorem facere, etiam cum alterius detrimento, dummodo citra injuriam: Si vero ob id quod cursus aquæ impediatur, & ex restagnatione fiat ut superius Molendinum perinde exerceri nequeat, prohiberi potest: nam sic debet quis rem suam meliorem facere, ne vicini Deteriorem reddat. *Heringius, de Molendinis. q. 14. n. 30.*

*An Molendinum possit Extrui sine licentia  
Principis?*

“**I**n flumine publico navigabili aut tale faciente, non nisi ex principis licentia: sed in alio non navigabili, attamen publico, sola Gentium autoritate Molendinum extrui potest. *Idem quæst. 15. n. 39.*

*Restagnatio Molendini.*

“**S**i duo in eodem flumine Molendina possederint, quoad Restagnationem pacta & consuetudo primum servantur; his deficientibus, qui prior ædificavit primas habet partes. *Idem quæst. 20. n. 10.*

Ufus



*Uſus Molendinorum Juri Civili ignotus.*

“**Q**Uæ de Molendinis nunc obtinent & in uſu ſunt, Juri civili ignota ſunt maxima ex parte; nam poſt Imperii translationem ex Oriente in Occidentem tempore *Caroli Magni*, etiam Juris mutatio ſucceſſit; & uſus Molendinorum alio loco eſſe cœpit quam apud *Romanos*: adeo ut Molendina extruendi facultas hodie non amplius ſit communis, ſed privata ut plurimum; ſiquidem Principibus, Comitibus, & Baronibus ab Imperatore; a Principibus rurfus viris nobilibus & aliis cum Territorio & feudis Jure Clientelæ tribuitur; ita ut jus Molendinorum probeneficio Regali aut principali æſtimetur. *Heringius de Molendinis. Quæſt. 7. n. 4. & ſequent. p. 124.*

*Ubi convenit, ut pro Familia molatur, quid Juris ſi aucta ſit?*

“**S**I in conceſſione feudi aut Emphyteuſeas aut ſimplicis Conductionis, pactum adjiciatur quod debeat accipiens molere frumentum pro tractu, ipſiusque tota Familia; eaque ſi aucta fuerit pro omnibus molere debet gratis, aut eodem quod convenerat pretio: poteſt enim evenire ut Familia minuatur & ſic molitor eſt in lucro: Cum igitur penes eum eo caſu foret Lucrum, debet damnum ſentire: Idem obtinet in Furno, & conceſſione Lignorum pro familia. *Hering. de molen. quæſt. 20. n. 15. & ſequen.*

*If a Mother and her Friends may ſucceed?*

**I**F in no caſe *Cognati* on the Mothers ſide can ſucceed? *Answer.* It is thought that they ought to ſucceed; ſeing the Son ſucceedeth to his Mother and her Friends; and *Jus ſucceſſionis* ſhould be reciprocal, being founded upon Proximity of Blood, which is the ſame to the Mother and to the Son: But in this our Cuſtome is lame, and *opus eſt vel conſtitutione vel Deciſione.*

*Mutuum.*

**M**utuum & Commodatum and ſuch other Contracts which are ſaid *Re contrahi*, and not *nudo conſenſu*; *Quæritur*, If they may not be ſaid to be Contracted, when a Write is Subſcribed thereupon, obligeing perſons to lend Money or *Commodare*? *Answer.* Such Contracts cannot be ſaid to be *Mutuum* or *Commodatum* niſi *res intervenierit*: And yet *datur ex iis actio præſcriptis verbis*, or *in factum*.

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N.

## N.

*Non-entry.*

**I**F the Superior of Lands holden feu, will have, during Non-entry, both the Feu-duty as his own, and the Non-entry Duty as Casualty and Fruit of his Superiority?

The Superior being in Non-entry. *Quæritur*. Though the Non-entry were declared, whether the Liferent Escheat of the Subvassal would belong to the immediate Superior? *Ratio Dubitandi*, It is not a *feudale Delictum* and *commisum*; but *ex lege*, which is in favours of the immediate Superior.

If the Superior suffer the Appeairand Heir to be in Non-entry and to possess without a Process for Nonentry; If he may have a real Action of poiding the Ground against a singular successor?

If the full Duties will be due to the Superior upon account of Non-entry following the Ward, albeit the Superior was not in possession during the Ward?

*Quæritur*, When Lands are Disposed by a Baron to be holden of himself; If before Declarator of Non-entry the full Duties be due, when the Lands are Disposed without any mention of Retour or Extent? *Answer*. If the Lands be Disposed to be holden from the Disposer of the King, a proportion only of the Retour Duty is due; Because the King and the Disposer having condescended that the old Barony should be extended, That part which is Disposed to be holden of the King *consentur eodem Jure* with the rest of the Barony; But when the Baron Disposes a part to be holden of himself without any mention of Extent, the full Duties may be claimed, at least the proportion of the valued Duty.

*Novo-damus.*

**T**HE King having granted a Charter with a *Novo-damus*, *Quæritur*, If he should have succeeded to a person having a better Right either upon Forefaulture or Recognition, or as next Heir; will the *Novo-damus* barr him? Or if the *Novo-damus* should be understood to be restricted to any Right or pretence or claim the King may have to the Lands by the Right of the Resignant, as falling in his hands by Forefaulture of him or his Authors, or otherwayes from their Right, and the committing of the same, either for ever or for a time?

*Quid Juris* as to other Superiors having succeeded to persons having a better Right?

*Quid Juris*, If other Superiors have received any Vassal upon Resignation or otherwayes; if they may question their Vassals Right upon another unquestionably better, falling to them as succeeding to any other person?

Lands

Lands having fallen to the King by Forefaulture, the person Forefaulted having but a Right of Superiority, the Property belonging to Vassals: *Queritur*, If upon Resignation of the Subvassal in the Kings hands as immediate Superior by the Forefaulture; a Charter with a *Novo-damus* will put him in that Condition, as if he had from the beginning holden of the King; so that the King cannot interpose another Superior by Disposing the Superiority that did belong to the Traitor? *Ratio Dubitandi*, That the *Novo-damus* is equivalent to an Original Grant: And yet is thought, That the *Novo-damus* is only an accessory Right, and in effect *Clausula executiva*; whereby the King gives the Property, that belonged to the Resigner with all Right he could pretend thereto; But not the Interest and Superiority that belonged to the Traitor, unless it were expressly Disposed: & *actus agentium non operantur ultra eorum intentionem. Duncan of Lunan.*

The King having granted to my Lord Kincardine, and thereafter to the Chancellor a Gift of the Wards and Non-entries that had fallen or should fall during the time therein mentioned Respective; and thereafter having given diverse Infeftments with a *Novo-damus*. *Queritur*, If the foresaid Donators could be prejudged by the saids *Novo-damus*? *Answer*. It is thought that the saids *Novo-damus* are of the nature of Gifts or Discharges of such Casualties, which the King might grant before Intimation made to the persons of the said Gifts.

### *Nullitas ex verbis non licebit.*

*Verba non licet vel non licebit, annullant actum; important siquidem necessitatem præcisam; negant potentiam, resistant actui & aliter factum invalidant.* Thef. Bef. in Litera K. 31. verbo Kan. Sect. ultima. p. 469.

### *Clausula ex nunc prout ex tunc.*

*Verba Ex nunc prout ex tunc, sunt retro activa & important canonem latæ sententiæ; operanturque actum completum etiam si verbum futuri temporis sit adjectum; adeo ut unum tempus insit alteri, extremum in primo, & primum in postremo.* Heringius de Molendinis quæst. 1. n. 45.

### *Nundinæ.*

*Nundinarum solennium Jus, ad majora Regalia pertinet.*

*Nunquam Cæsar consuevit alicui dare Nundinarum privilegium, nisi prius adjacentibus & vicinis Civitatibus quarum interesse potest, auditis.*

*Nundinarum favor magnus est, quia earum tempore res aut persona alicujus arrestari non debent; Secus in Mercatis.*

*Quemadmodum tempore Nundinarum in loco illarum arrestare aliquem non licet; ita etiam nec in illo sine quo Mercatores ad Nundinas venire non possunt,* Thef. Befold. in Litera M. 43. p. 631.



## O.

## Oath of Coronation.

**I**F what is required and promised, by the King the time of his Coronation, be understood to be *Conditiones Regni*, so that the same not being fulfilled the People is free? *Answer.* These are not *Conditiones* either *Suspensivæ* or *Resolutivæ*, but *modus regnandi*: And albeit *Modus* ought to be fulfilled, and subjects who are under a Coercive Power may be urged to observe the same; yet a Prince who is subject to no higher Power *relinquitur Religioni Juramenti, & Deum solum habet ultorem.*

These Similies may be urged to this purpose, *viz.* A Father is obliged not to provoke or wrong his Children, and that is *Modus* implied in the Relation of a Father; and yet if he do otherways the Relation is not taken away: And when Parties are Married, there is Stipulation *hinc inde* of mutual Duty, not only as to Chastity, but as to other Duties, and yet though they fail in the same, being only *Modus vinculi conjugal*, the Marriage is not dissolved except in the case of Adultery: That Duty of mutual Chastity being *inter essentialia*, and the other Duties *inter naturalia conjugii*.

## Qualified Oaths.

**W**Hether qualified Oaths may be received before Inferior Judges? *Answer.* It is thought not: The question whether the qualities should be construed qualities or Exceptions, being of that difficulty, that they are not to be decided by Inferior Judges.

The Lords are not in use to receive qualified Oaths unless they be given in to be seen by the other Party, and upon debate be found Relevant; so that the person who is to give his Oath may be admitted to Swear in the terms of the same, as being properly Qualities and not Exceptions. *Quæritur*, What Qualities ought to be sustained? And seeing it is the common opinion that intrinsic qualities may be received; *Quæritur*, What Qualities are to be thought Intrinsic? *Answer*, These are Intrinsic that are inherent in the Act and Matter in question *v. g.* If it be referred to the Defenders Oath that he promised to pay the Pursuer a Sum of Money, he may declare in what Terms he promised, *pure, in diem, or sub Conditione.*

If it be referred to a Parties Oath that he is Lyable for a House-mail (having taken and dwelt therein) after three Years. *Quæritur*, If he may declare with that Quality that he payed the same? *Ratio Dubitandi.* That it is Extrinsic, and not a Quality but an Exception: On the other part, *quomodo unumquodque ligatur, solvitur*; and the Debt not being proven but by his Oath, he may prove payment the same way. *2do.* There is a presumption in Law, which is the Ground of so momentary a Prescription, That such Debts are not so long owing; And therefore it ought to be proven

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ven by the Defenders Oath they are owing. 3<sup>tio</sup>. It is the common practice, that Parties that are not bound by Write think they are *in tuto* to pay without Writ.

If he declare not *positive* that he payed, but that he Assigned a bond or Debt in satisfaction. *Queritur*, If that Quality should be received? *Answer*. It is thought, that it is not intrinsic.

### *Correspective Obligements.*

**Q**uid *Juris*, If there be correspective Writs of one Date, but not in one Body, as *v. g.* a Disposition of Lands and a Bond of the same date for payment of the price: If the Exception competent against the price (*viz.* The Disposer cannot be lyable unless the price be payed) will militate against the singular Successor? *Ratio Dubitandi*, The Disposer *sequitur fidem*: And the Obligement to pay the price is not in *corpore juris*; so that the Assigney is *in bona fide* to take a Right thereto: & *Contra*, Personal Exceptions competent against the Cedent are competent against the Assigney, in Obligations personal *hinc inde*.

It is informed, that there is a *Decision*, That such Exceptions are not competent against Assigneys.

### *Mutual Obligements in Contracts.*

**I**F there be a mutual Contract anent the selling of Lands and payment of the price; & the Buyers creditor comprise the minute in so far as it is in his favours; whether he will have action for implement unless he pay the price? *Answer*. He will not: Seing the final cause of the Disposition is the Price.

### *If Offices do Escheat by Horning?*

**I**F the Keeper of a Register, or Writer to a Seal be at the Horn *Queritur*, if his Office will fall under his Escheat? *Ratio Dubitandi*, That nothing is Escheatable but that which may be transmittted and is applicable to another; whereas an Office is a personal Function, and *industria personæ eligitur*, which is so personal that it cannot be conveyed by his Escheat to another.

If at least the Rebëll doth forefault his interest, if he be year and Day at the Horn? And *Quid Juris* as to Judges, who have places from the King, and as to Commissars, and Ministers, that are presented by other Patrons, whether by their Rebëllion they be so disenabled, that they cannot enjoy their Places, and their Patrons can present others?

Whether at least Relaxation will reponè the Rebëll, and take away the Inability?

### *Omissa & male appretiatâ.*

**A** Person being named Executor and universal Legatar. *Queritur*, If a Testament *ad omissa & male appretiatâ* be confirmed, will the principal

cipal Executor Loss both the Office and the Benefit of the Legacy, as to what is omitted and *male* Appretiat? *Answer.* It is thought, he will Loss both, in respect of his Fraud and Perjury, in the same manner as the nearest of kin confirming, will in the like case, loss not only the Office but the Benefite competent to him, as nearest of Kin, as to that which is omitted, or *male* Appretiate.

### Operæ.

*IN Materia Operarum Consuetudo & præscriptio multum consideratur.* Jus Fluviale p. 121. n. 3.

### Order of Discussing.

**W**hen a Defunct doth oblige him and his Heirs, renouncing the order of Discussing, *Quæritur*, will the Heir of Line be lyable to Relieve the Heirs of Tailzie and Provision, as to such Debts for which by the Law he should have been first Discult?

### P.

### *Pactis Privatorum non Derogatur Juri Communi.*

**T**hat Law That *Pactis privatorum non derogatur juri Communi* what way it is to be understood? And if it be only as to Solemnities, or Formalities provided by Law, and not when the Law provides any benefit in favours of a person, as a Communion in favours of a Husband and Wife; or Courtesy or Terce, or such like?

The Prince, and under him the Judge, and in special *casibus* (sed quis custodiet ipsum Custodem) the Lords of Session, have not a Legislative Power: And when there occurs a Case not formerly decyded, and the best governed Nations do not agree anent the Point in question; some being for the Affirmative, some for the Negative; and upon probable Reasons on both sydes, *sustinendum Judicium*: Or, if the Question be of an Exception from a general Rule; the Rule is to be stuck to, until there be a Law to the contrare; as in that case, whether Minors should be debarred from the Remedie of Restitution, by their Oath; conform to the Novel *sacramenta puberum*: Which in effect is to make a new Law.

### Parliament.

**I**F Reductions may be pursued summarly before the Parliament *in prima instantia*? It is thought, that although when *my Lord Lauderdale* was *neral*



Commissioner, that was done, in the Case of the *Lord Forrester against General Ruthven's Relict*; and at the instance of the *Lord Dundie against Pittar*; And there is now a Complaint at the instance of *Edzel against The Earl of Crawford* for reducing the said *Earl* his Title: yet such Processess would not be sustained before the Parliament, If it were represented, That by Diverse ancient Laws, and for great Reasons it is provided, that all Complaints *in civilibus* should be first pursued before the Judge Ordinary.

### *Passing from a Right.*

**I**F a Tackfman of Teinds having a Tack yet to run, take another Tack of the saids Teinds: Will he be thought to pass from the former? *Lauderdale contra Tweeddale.*

### *Patents of Honour.*

**P**ATENTS of Honour being granted to a Person, and his Heirs Male of his Body; *Quæritur*; 1mo Whether the appearand Heir may sit in Parliament and not be Lyable as *Behaving*? *It is thought*, (whatever may be pretended as to Custom) in strict Law he should be lyable; seing in General, the owning an Heretable Interest is *aditio passive*, and *gestio pro hærede*. 2do. *Quæritur* If a Patent and Title thereby, may be resigned as *feudum* for a new Patent to the Resigner and other Heirs than in the former? *Cogitandum*. If it may be resigned, *Quæritur*, If the Resigner must be first served Heir? *Cogitandum*.

If a Nobleman having a Patent to him and the Heirs Male of his Body, should thereafter resign his Title and obtain a new Patent to him and his Heirs Male of his Body, which failzieing to his Eldest Heir Female without Division: And the Heirs Male should fail; may a Nobleman who in the *interim* has got his Title betwixt the first and second Patent; claim place before the Heirs Female, as having Right by the second Patent, being before theirs: Or if the Heirs Female will have place as representing their Predecessor, who had Place by the first Patent, seing the second is but a Continuing of the first in favours of him who got it, with an alteration only as to his Representatives: And they who had posterior Patents were not concerned who should represent him; and it was uncertain whether the first Heirs should fail; so that they might have any prejudice by the change. *Roxburgh contra Lothian.*

### *Pecunia Pupillaris.*

**I**F a Tutor uplift the Maills and Duties of Lands, a *quo Tempore* will he be lyable to stock the same; so that the Pupils Means be not unprofitable? Or if this be not *Casus arbitrius*, according to the variety of Circumstances? *Balhoufy and the Tutor of Dumb James Hay.*

If a Tutor be not lyable for Annualrents, and when should they be stocked?

### *Pensions granted by the King.*

*Quæritur*, Seing Pensions granted by private Persons are binding, and are a Ground of Action; Whether Payment of Pensions granted by his Majesty may be denied? And if not, What Remedy is competent?

### *Personalis Actus.*

*Actus*, in quo est apposita dictio *Ipsi*, in contractibus non stat restrictive, sed tantum demonstrative; ideoque non impedit transmissionem; & Contractus non obstante dictione *ipsi* ad hæredes transeunt, quia quilibet præsumitur suo hæredi ut sibi prospicere; quæ præsumptio non tollitur ex dictione *sibi*, quia est violenta & procedit ex visceribus naturalibus, contrariam probationem non admittentibus.

“Si in alia Dispositione sit simplex concessio, Dictio *sibi* non restringit: & adjectio personæ in concessione de sua natura ad hæredes transitoria non facit quod concessio sit personalis, & non transitoria.

“Secus est in concessione non transitoria, puta ubi electa est industria personæ: vel in actu personæ cohærente. *Thef. Besoldi, in litera L. 10. verbo Ihme. p. 425.*

### *Pignora.*

*Servi Aratores & Boves Aratorii, & Instrumenta rustica pignori haud capiuntur, l. 7. Cod. quæ res pignori obligari, &c.*

“In obligatione generali *rerum quas quis habuit aut habiturus est*, non continentur quæ verisimile est quemquam specialiter obligaturum non fuisse, ut supellex quam quis habet in usu quotidiano & necessario, vel quæ ad affectionem ejus pertinet.

“Invecta in prædium urbanum tacite oppignorantur; secus in prædiis rusticis quia sufficit in iis fructus teneri, *Heringius de molendinis q. 28 n. 12 ad 18 inclusive.*

“Studiosorum supellex libraria sub tacita illa oppignoratione non venit: *Ibidem.*

“Ea tantum invecta censentur obligata, quæ illata sunt ut perpetuo ibi sint; ideo nomina & instrumenta obligationum & merces illatæ ut venderentur haud veniunt. *Ibidem 20.*

“Creditor jure civili poterat pignus alienare, etiamsi pactum non inter- venerit; prævia tamen denunciatione ut debita solvat; & licet pignus alienare, cessante debitore in solutionem per biennium post denunciationem. *Perez. Lib. 2. Tit. 8.*

### *Plenishing; If a Wife be provided to a part of it?*

**B**Y Contract of Marriage, a Wife is provided, in satisfaction of Terce, Third or other part of Movables, except the half of the Plenishing of the House the time of the Husbands Decease, Whereto it is provided she shall have Right. *Quæritur*, If there be no Free Gear, will the Heir be obliged

obliged to free the half of the Plenishing? *Ratio Dubitandi*. The Contract bears she should have Right; and she is in the same case as if her Husband had disposed for an Onerous Cause the Plenishing he should have the time of his Decease: And on the other part, it seems this Provision should be understood *Conditionaliter*, if there be free Goods: And the Clause being an Exception from a Renunciation, both the Renunciation and Exception from it, ought to be of the *Regula*, and of that which would belong to her, if she were not excluded, which could only be the free Gear.

If the clauses do not bear besides the *Heirship*, *Quæritur*. If she will have Right to the plenishing, without Deduction of the Heirship? *Eadem Ratio Dubitandi*.

### Possessor.

*Processum litigiosæ possessionis, Hispani Interim, Galli Recredientiam, Belgi Provisionale remedium, alii processum informativum appellare solent, Budæus litem vindictariam. Thes. Bef. in Litera I. 29. verbo interim mittel.*

*Possessor bonæ fidei fructus consumptos suos facit absolute, extantes vero Dominocedunt.*

*Possessor vero malæ fidei, nec consumptos nec extantes suos facit, sed Dominus extantes vindicat; consumptos vero condicere conditione sine causa. Perez. lib. 2, Tit. 5.*

### Poining of the Ground.

**A** Lord of Erection having Disposed Teinls, and the *Reddendo* bearing a Sum to be payed for a proportional relief of the blenlh duty payable by the Lord of Erection; and certain Bolls of Victual to be payed also for his relief to the Minister: *Quæritur*, Will the Minister have action for poining the ground? *2do*. What will the Superior's poining the Ground import?

A Decreet of Poining the Ground being got against the Heretor for the time and the Tennants: *Quæritur*, If after the Death of the Heretor the Lands may be comprysed for the Bygoners from the Appearand Heir, without a Decreet of transferring, or a new Decreet: *Answer*. It is thought, there is no need of any other Decreet; the Decreet being Really founded; which may be recovered against an Appearand Heir, and put in Execution by Comprysing, or poining against him.

### Pre rogative

**I**F the Question betwixt *Roxburgh*, and *Lothian*, should be determined with respect to his Majesties Prerogative being the Fountain of Honour? It is thought, that His Majesties Concessions, whatever the Subject be, should be judged *jure communi*; And that *jus quæsitum*, whether as to Honour and precedency or any thing else, cannot be taken away upon any such pretence. The Prerogative is *instar littoris* which is defined *quo fluctus Hybernus exæstuat*: So that as the Sea does not go beyond the Shoar when



the Sea is most full; so the Prerogative and *Plenitudo Potestatis* does never go beyond Law, which is a great *Littus* and Boundary of just Power.

The Royal Prerogative is acknowledged and asserted by diverse Laws and Acts of Parliament of this Kingdom; But how far the Extent of the same may reach, is a point of State and Policy of the highest nature and importance, and not to be defined by the Opinions of Lawyers, but by the Highest and Legislative Authority.

The Royal Prerogative is not only asserted in the general by the Laws of the Kingdom; but diverse and great Powers, Rights and Priviledges belonging thereto, are in special declared by diverse Acts of Parliament; both in Relation to the Government, and in Relation to His Majesties Interest, and Questions, and Causes, betwixt Him and His Subjects; *As the Power of Calling and Dissolving Parliaments; The Choising and Appointing Officers of State, and Commissioners and Judges; To make War and Peace; And that there can be no Meetings to Treat or determine in Matters of State without His Majesties Authority and Warrant: And that upon no pretence there can be any Rising in Arms without His Warrant; And His Right to Customs; And Power to grant Remissions for the Highest Crimes: And that the Negligence of His Officers cannot prejudice Him.* And albeit by the Common Law the Eldest Superior is preferable, yet when Lands are holden of diverse Superiors Ward, the Marriage of the Vassal, which otherwayes would belong to the Eldest Superior, doth pertain to the King, tho as to the Vassal his latest Superior: And by custom, albeit the going to a Miln, for never so long a time, being *facultatis*, doth not import Servitude without a special Affriction, yet the repairing to His Majesties Milns, by the space of Forty Years, doth induce a Servitude, without any other constitution: As to which and other points of the Prerogative, explained by Law and Custom, Lawyers may and ought to give their Opinions in Law.

But as to Lawyers and Juris-consults, it is said, *Turpe est sine lege loqui, & ubi leges silent* they cannot but be silent: And the Laws of Scotland, which ought to warrant the Resolutions and the Opinions of Lawyers, in Questions concerning the State and Government, are only the Statutory Law and Acts of Parliament, and the common Law and custom and undeniable practice of the Kingdom.

As to the Civil Law of the *Romans*; it was only the Municipal Law of that People; And by reason of the great Equity of it, in Questions *de Jure privato*, tho it has not the force of Law with us; yet it is of great Authority and use in cases not determined either by statute or custom: But, as to Questions of State and Government, the Civil Law is of no use with us; in respect the Laws of all Nations, concerning their State and Government, are only Municipal; and the Constitution of the Respective States doth varie both from that of the *Romans*; and for the most part each from another: So that any Questions, concerning the same, cannot be solidely or warrantably Answered, upon Principles or Reasons brought from any Law, but the constitution of the Government and Laws and Customs of the Nation and Kingdom concerned.

It is conceived, That when the Opinion of Lawyers is asked, *Res* should be *integra*, and they should bear liberty to give their Opinion freely and without

without prejudice, which they cannot doe after His Majesty has any way predetermined them, by declaring his own Royal Will and Pleasure:

As to that *Question*, What can be said, in Law, in defence of these who have acted contrary to Law, in Obedience to His Majesty, or upon his Royal Dispensation; if they should be questioned in the time of Succeeding Kings?

*It is answered*, That, upon the Grounds foresaid, nothing can be said positively to secure them, from *Question*, either by our Law or Custom; The said case being not mentioned nor determined by either: But it is to be thought and presumed, that His Majesties Prerogative being asserted by the Laws foresaid, and His Majesties owning that power to *Command* and *Dispense* as a part of His Prerogative, and they conceiving that it was not their duty to dispute His Majesties Power; Succeeding Princes will not think it their interest, to be severe against any person, for exceeding in Obedience to their Royal Predecessors.

### Prescription.

**I**F a Feu-Charter of Kirklands, not confirmed by the King or Pope, with Sealins thereupon, may be a Title to warrand Prescription?

Temporary Prescriptions, as in case of House-Mails, Servants Fies, Ejections, &c. If they run against Minors?

The Vassal retouring his Lands to be in Non-entry Fourscore Years, *Queritur*, If he may object Prescription *quoad* the retoured Non-entry Duties? Seing after the Years of prescription, he confesseth the same to be due: *Et Temporalia ad agendum sunt Perpetua ad excipiendum?*

If His Majesties annexed Property does prescribe?

If Prescription run, against these who were Forefaulted by the Usurper, *Qui non valebant agere*: Found for the Negative, *Lauderdale contra Tweeddale*; That *Lauderdale* his Father and Good-Sire *non valebant agere*, Because upon his Fathers Resignation *Queen Ann* was Infeft in Liferent, and might have excluded them during her Lifetime: and though he might have intended a Declarator; yet that being such an Action, as could not bring him to possession, he was not obliged to intent it: This Reason appears not to be without some Question, seing if there were a Liferenter and Fiar, and the Fiar should not prevail with the Liferenter to join in an Action for interrupting prescription, the Fiar should be without remedy if he would not interrupt by Declarator: and if a Declarator do interrupt, it cannot be said that *non valebat agere*. 2d<sup>o</sup>. A Declarator would have brought the Lord *Thirlestoun* to Civil possession, at least so far as it would have been declared, that the *Queens* possession was his, and by vertue of the Right thereof he was Fiar: And if the *Queen* would not owne the possession to have been by that Right, she should have been forced to remove: So that by that Action they might have attained natural possession.

Before the Act of Parliament 1621. anent Compyrings, the Legal ran against Minors; which argues, that the Temporary Prescriptions of Spuilzies, for House-Mails, Removings &c. run against Minors.

If there be a difference betwixt the time of prescription in *England* and *Scotland*? Whether is prescription *inter decisoria*?

*Item*, If Prelates, provided before the Act of Parliament 1585. (against Dilapi-

Dilapidations) may notwithstanding thereof set Tacks without hazard? Seing the Act seems to militate only as to persons provided thereafter.

If a Feu-set contrary to the said Act against Dilapidations, may be a ground of Prescription? *Ratio Dubitandi*, That by the said Act, the Patrimony of the Prelates is *extra commercium*, and is of the nature of the annexed property & *quod non est alienabile non est prescriptibile*. Vide, *Dilapidation in litera D*.

If in all cases when an Obligement or Interest and Right is in the Defenders Right, whereby he bruiks, may he alledge Prescription, as he cannot do in the case of Reversion, there being *Eadem Ratio*?

What is the Reason, that Reversions Registrate do not prescribe? Seing Bonds Registrate do notwithstanding prescribe.

If a Faculty granted to a Person as *v. g.* to the Dispcner of Lands, and a power to Dispone the same, or to Redeem upon a penny, doth prescribe being granted apart?

If, Prescription being alledged against a Bond, it be Relevant to reply and to offer to prove by the Excipients Oath, that to his knowledge the Debt is due, and true, and not satisfied?

If a Reversion be granted only for five Years, *Queritur*, If in that case it prescribes against Minors? *Vide de Retractivis Gentilitiis*, if they prescribe against Minors?

If a Minor acquire Right to a Comproysing near expired, *singulari titulo*, will the Reversion be prorogate? and if there be a difference betwixt a Minor succeeding as Heir, or otherways *Singulari Titulo*?

### Prescription against the King.

THE Act of Parliament 1617. Militateth against the King, as to real Actions; when the Defender has prescribed a Right by possession founded upon the Rights therein mentioned; as appears by the express words and the ground of that Prescription, being not so much *odium & negligentia non petentis* as *favor possidentis*, which is the same as to the King as to another: But in that part of the Act anent, the prescription of Personal Actions, there is no mention of the King, and he cannot be said to be negligent; and it is declared by Act of Parliament, that the negligence of his Officers shall not prejudice him. *Queritur* therefore, if Prescription in that case be competent against the King?

“*Verba semper & quodocunque designant temporis infinitatem: & si in pacto de retrovendendo adjiciatur hæc clausula, ut quodocunque venditor & ejus hæredes velint pretium offerre, Prædium recipere possint, non obstante triginta annorum præscriptione, Jus redimendi semper & in perpetuum competit; nisi possiderit Emptor pro suo; vel contraxerit Reluitioni: ab eo enim tempore incipit præscriptio: In Contractibus enim nullum verbum debet esse otiosum, verba autem quodocunque &c. essent otiosa si non operarentur. Thes. Bes. litera I. verbo 5. Je und allwegen*”  
p. 423. & 424.

“*Princeps potest privato privilegium concedere, ut ipse solus in aliqua parte maris aut fluminis publici piscari possit; aliosque ne id faciant prohibere: Loca publica, & quæ Jure Gentium communia sunt, præscribi possunt*”



"possunt tanto tempore cujus initii memoria non existat: præscriptio  
 "enim immemoralis vim habet privilegii seu Tituli, & potius præsumpta  
 "concessio quam præscriptio dicitur; & præsumptio ex ea exurgens est  
 "Juris & de Jure, nec admittit probationem in contrarium. *Jus Flaviati-*  
*"le. p. 260. n. 261.*

"Præscriptio impium præsidium *Novel. 9.*

"Respublica & municipium non restituitur adversus præscriptiones  
 "temporales; quæ Jure veteri respuebant restitutionem. *vide Frisoh.*  
*"Tom. 2. Exercit. 2. n. 58. & sequent.*

"Jure Novel: præscribitur contra Rempublicam & Civitatem, Tri-  
 "ginta vel quadraginta ann. *ibidem. n. 63.*

"Præscriptio Conventionalis a Defuncto cœpta currit contra Rempubli-  
 "cam quæ ei successit, *ibidem. n. 65.*

"In Præscriptione, Jure Civili bona fides requiritur ab initio, nec desinet  
 "ufucapiens acquirere licet mala fides superveniat: Jure autem Canonico  
 "bona fides requiritur toto tempore.

"Requiritur etiam Titulus, id est, justa causa possessionis & habilis ad  
 "transferendum Dominium.

"Res furtivæ & vi possessæ Jure Civili ufucapi nequeunt. *Perez. Instit.*  
*"Tit. 10.*

"Nihil enim operatur bona fides aut Titulus propter vitium, nisi vitio  
 "purgato, nempe re furtivâ reversâ in potestatem Domini.

"Servus Fugitivus non ufucapitur, quia fugiendo sui furtum facere di-  
 "citur.

"Si quis mala fide, absente forte Domino vel negligente aut eo decedente  
 "sine successore, fundum alienum possederit & vendiderit Emptori bonæ  
 "fidei, non obstat ufucapioni vitium quasi rei furtivæ; non enim fundi  
 "locive furtum committitur, aut rerum immobilium facilis est inter-  
 "versio.

"Res Fisci ufucapi non possunt, quia Juris publici sunt: bona autem va-  
 "cantia ufucapiuntur quæ hæredem non habent, si antequam a Fisco occu-  
 "pentur ab alio possideantur; quia nondum Fisco denunciata, non sunt  
 "Fisci, sed manent in Commercio.

### *Presentation upon Forefaulture.*

**Q**uæritur, If a Composition be due to the Superior for receiving a Vas-  
 sal, presented by the King upon a Forefaulture? *It is thought*, That  
 it is not due; seing he is obliged to receive him; and the Lands belong-  
 ing to the King by the Forefaulture, he does a Favour to the Superior by  
 presenting one in his place.

The King having presented a Vassal to the immediate Superior, some  
 years after the Forefaulture of the former Vassal, *Quæritur*, Whether the  
 Person presented will have Right to the Duties become due since the  
 Forefaulture, or if the same will belong to the Superior? *Cogitandum.*  
 But it seems, that the King having no Right to the Lands, which he can-  
 not hold of a Subject, but having only Right to present a Vassal in the  
*interim*, the Duties should belong to the Superior, seing the Property be-  
 longs to no Person; And the Superiority draws unto it the Right of Pro-

perry, and the Superior not having a Vassal ought to have the duties of the Lands: Otherwise if the King should not present for many years he should want the Fruits and Benefit of his Superiority: And it is not his fault that he wants a Vassal, seeing hardly he could force the King to present. *The Lord Tarras.*

### Process against Strangers.

**I**F a French Man or Hollander v. g. should retire out of France or Holland hither, and should be Pursued in this Kingdom at the instance of these who have contracted with him in the Place where he was, *Quæritur*, If Process should be Sustained against him here? And if it should, according to what Law should he be Judged? Seeing our Judges are not presumed nor obliged to know any other Law but our own and the civil Law. *Answer.* They ought to have Process according to the Law of the Place where they Contracted, which may be known upon a Commission.

Seeing *Mobilia* and *Immobilia habent situm* viz. *illa fixum, ista vagum*, *Quid juris* as to *nomina Debitorum*, *utrum sequantur personam Debitoris an Creditoris*? So that a Debt due by a Scotsman to a Stranger should be considered as a Scots interest & *res Scotica*; and a Testament concerning the same should be confirmed in Scotland.

*Quid juris* as to annualrents, when the Laws of the Place where the Creditor lives and our Laws do vary?

*Quid juris*, When the Debitor being a Scotsman and having granted Bond in Scotland, has retired elsewhere, both as to the effect of confirmation and Annualrent whether Lawful or no Lawful? And if the Annualrent should be ever considered with respect to the Place, where the Debitor was *Incola* the time of the contracting?

### Procuratories of Resignation.

**I**F Procuratories of Resignation, granted by Magistrates, Expire by the decease of the granters?

### Promise to Dispose, not *in writ*.

**I**F any Person or their Heirs may be pursued, for implement of a promise to dispose Lands and Heretages; it being referred to the Oath of the Person that made the Promise (or of his Heir if he be deceased) that such a Promise was made? *Answer.* That it is thought, that as when upon a Treaty and Agreement Writs are drawn, Parties may Refuse, before Writs be subscribed; There is *eadem*, if not *major Ratio* in Promises, which cannot be perfected but in Write, *Et nihil actum creditur, dum quid supersit agendum, nisi accedit Juramentum. Vide Emphyteosis*, and what the Lawyers say in such Cases, where Write is necessary.

### Protections:

**I**F Persons cited to appear before the Justice or Council, or imprisoned by order of the Justice or Council, may be taken or arrested upon Caption or otherwise, for a Civil Debt, though they have not Protections?

*Pro.*

*Provision in favours of Bairns.*

**I**T was provided by Contract of Marriage, that the Conquest should be employed upon Rights to the Husband and Wife in Conjunct Fee, and to the Bairns of the Marriage in Fee, *Queritur*, If the Husband, having acquired a considerable Estate, may he advantage his Heir or any other of the Children, and give a greater Proportion to them than the rest? Or will the Conquest belong to all equally? *Ratio Dubitandi*, It were hard that the Father should not have power to divide his Estate amongst his Children, and in Consideration of it to oblige them to be dutyful. On the other part, the provision being in favours of the Children which is *nomen collectivum & universale, indefinitum æquipollet universali*. 2do. If that Power were allowed to a Father, it may be abused; and intending to marry again, he may deal with one of his Children, and giving more nor his Proportion, he may by transaction settle all the Conquest on him; and take a great part of it back from him in prejudice of the other Children. 3tio. By that Provision there is a Legitime settled upon the Children; and as the Father cannot prejudge them of that which is given them by Law, but the Bairns-part must divide equally, so he cannot prejudge them of that Bairns-part provided by Contract; unless by the same, the Father had that *arbitrium* and Power given to him, as sometimes it is.

*Provision in Bonds.*

**A** Bond of provision being granted by a Brother to a Sister, for a Sum to be payed to her at the next Term after the Bond, without mention of Heirs or Assignes, but with a Provision, that if she should decease unmarried it should return to the Granter and his Heirs; *Queritur*, If she having assigned the Bond, the Assignes will have Right, albeit she deceased unmarried? And what the import of the said provision is, whether a Substitution, or a Quality of the Fee and a *fidei commissum*, that she should not assign but with the burden of it? *Ancrum younger contra Mangertoun.*

*Provisions in Charters.*

**I**F Lands be disposed to be holden of the Disposer, with a Provision that if the Vassal be year and day at the Horn, his Liferent shall not pertain to the Disposer; but (now as then, and then as now) shall be given and belong to himself. *Queritur, Quid Juris? Ratio Dubitandi, Dolus futurus non potest remitti*; and being *pactum contra legem* made to fright from Disobedience and Rebellion, the Rebell ought not to have the advantage of it: Nor the Superior, because *remisit*; & *quod aufertur indigno, cedit Fisco*.

If such Pactions will bind singular Successors in the Superiority? *Ratio Dubitandi*, That they can be in no better case, than their Author; and these Pactions are *in rem Active & Passive*: And the Superiority being only by the Disposition and Infeftment thereupon, it is qualified with the said Provision, and cannot be transmitted otherwise than as it is *Jus affectum & limitatum*.

Pro-



## Provisions in Contracts.

**A** Father being obliged by Contract of Marriage, to employ a Sum to himself and his Wife in Liferent only, and his Bairns of that Marriage in Fee; which failzieing to his Heirs and Assignes: If Infeftment should be taken in these Terms, whether is the Father Fiar, so as the Bairns could not succeed but as Heirs of Provision to him. Mr *Andrew Marjoriebanks Contract of Marriage.*

If the Fee were secured to the Children, By an Infeftment to a Trustee to the behoof of the Children; if it be the Fee of all his Estate, and being a merchant, and thereafter People contracting with him as a Person of a visible Estate, would the Creditors be prejudged by such Provisions in a Contract, not publick by Infeftment upon it, or Inhibition? *The same case.*

## Provisions in favours of Daughters.

**BY** Contract of Marriage it is provided, that in respect the Estate was Entailed, The Daughters should be provided, If there be one, to 50000 Merks; if two to 60000: whereof to the eldest 37000 Merks and to the other the remainder; to be payed at their age of sixteen years or their Marriage. *Queritur*, The Father having survived, and there being two Daughters of the Marriage at their Mothers Decease, of which the Elder died not long after; long before the age foresaid. 1mo. Will the younger surviving get 50000 Merks, being now the only Daughter of the Marriage? 2do If at least she will have the portion of the elder being 37000 Merks? 3tio. If her Sisters Portion will accresce to her as nearest of Kin? 4to. If the said Provisions be conditional, viz. If they Marry or attain to sixteen Years? 5to. If such Provisions be personal? at least so far, as if after the Term they be not assigned and the Daughters die, they will not transmit, there being no mention of Heirs? 6to. The said Sums not being due upon account of Creditum, but of Provision for a Livelyhood, that they may be married, or at least have a Competency to live upon; *Quando Dies credit?* Whether after dissolution of the Marriage, or when they attain to the Age foresaid? *Scot younger of Ancrum.*

## Publica.

**C**onfirmatio munerum publicorum hodie a Principe successore petitur; sed si denegaretur injuria fieret a Principe. Jus Fluviat.

Publicum seu publica utilitas varijs modis dicitur, viz. 1mo. Cum in universum & particulariter Commodum affertur, quod in Sacris, Sacerdotibus, & Magistratibus, consistit. 2. quæ in universum conducit, non autem singulis; ut quæries de locupletando fisco agitur. 3. Quæ privata proprie, licet ex ea consequatur publica utilitas; ut cum dicimus, Tutelam esse munus publicum, & Testamenti factionem esse juris publici. Hering. de molend. Quest. 15.

n. 14.

**Pupils**

## Pupils.

**I**F in Law Pupils who have neither *Velle* nor *Nolle*, may be Charged and Denounced?

## Q

## Quartering.

**I**F there may be Quartering for Impositions laid on by the Major part of the Shire, though there were ground for the same? *Answer, Negative*, Seing Quartering is *Remedium Extraordinarium & Militare*, and cannot be used but where there is a Law to warrand the same: But in such Cases, if there be any thing done behoovefully for the Shire, They who are refractory may be pursued *actione negotiorum gestorum*, before the Sheriff or other Judicatories, and upon *Declaratory* Execution may follow.

**I**N the case of Mr. John Bayne of Pittcairly mentioned in the Title. *Dispositio collata in arbitrium alterius in litera D.* The Friends being so named that the major part should have power to determine; There being Three of Ten. *viz.* The Chancellor, Sir John Nisbet, and Tarbat, *sine quibus non*, and in case of any of their decease, Sir William Bruce. *Quaritur*, If all the three *sine quibus non* must consent? Or if it be necessar only that there should be a *Quorum* of the Meeting? *Ratio Dubitandi*, His naming Three *sine quibus non*, appears to be upon that account, because two might not agree. *2do.* It were hard, if all the Friends should agree but one of the *sine quibus non*, It should be in his power to evacuate the Defuncts Will and Design. *3tio.* When a Commission is given to Three Persons to be Judges or Arbitrators, they must all be present, and yet if two agree though the third dissent, their sentence will be valid.

If any one of the *Quorum, sine quibus non*, should settle with the Heirs, of design to question the Defuncts Deed. *Quaritur*, If he (as having Faulted his Trust) should be in the same case as if he were Dead?

## R.

## Ratihabitio.

**R**atihabitio retrotrahitur ad initium, & Mandato comparatur.

*Jus Ratum.*

*J*us Grutiz vel Ratum (Flotrecht) jus, viz. Traducendi ligna super flumine ad Regalia spectat. Jus Fluviat. p. 97. n. 11.

*Jura Realia in Re & in Rem.*

*J*ura Realia vel sunt in Re ipsa vel in Rem tantum: Jura autem ad rem interdum sunt in rem, personalia tantum sed ad rem consequendam, ut Dispositiones, Contractus, & Reversiones ubi non sunt Registrata.

Jura in Re & Terris sunt ea quæ per Sasinam competunt (nulla enim Sasina nulla Terra) scilicet jus Dominii (vel directi vel utilis) vulgo superioritatis & proprietatis, Jus ususfructus & conjunctæ infeodationis, Jus Hypothecæ seu impignorationis vulgo Wadssets, Viduarum Triens seu Tertia, Curialitas Scotiæ in dulta Maritis conjugibus, si Uxor in Terris successor aut Hæres & prolem enixa fuerit, licet haud vitalis statim moriatur: ea enim Jura Viduis tam marito quam conjugii competunt, ex sasinis & in terris in quibus alteruter obiit vestitus & sasitus; ut ex Brevis patet.

Jura autem Reversionis & Regressus moribus nostris Realia sunt & in Rem; ut adversus non tantum hæredes sed singulares successores efficacia sint; idque haud sua natura, cum re ipsa sint tantum personalia pacta de retrovendendo; sed moribus nostris ubi rite Registrata sunt, etiam adversus emptores, aut alios singulares successores, rata & valida habentur; cum insinuata iis innotescant aut juri possunt.

Nec minus servitutēs prædiorum, & conductiones seu assedationes, Jura Realia & in Rem sunt sine sasina, si ante venditionem possessore accedat.

*Rebellion.*

*A* Bond being Assigned by a Rebel and the Assignment not intimate before the Rebellion. *Queritur*, Whether the Assigney, or the Donator will be preferred? *Ratio Dubitandi*, That the Assignment denudes the Cedent, and the Intimation is not necessary but to exclude another Assigney: And the Rebel by his Rebellion does not transmit but amitts and Forefaults any Right that he has, which being in nullius bonis is *Domiini Regis*; whereas it cannot be said that the Bond was in nullius bonis after the Assignment, seeing it is then in bonis Cessionarii.

*Whether the Rebels Goods ought to be Lyable  
to Creditors?*

*S*eing Bona are understood *Debitis deductis*, and by the custom of all Nations when they are confiscate *Transcunt cum sua causa*, and with the burden of Debts, what can be thought the reason that it is otherwayes with us? *Answer*, It is thought, that seing Lands when they are Forefaulted either to the King, or to the Superior, they return in the same manner & ut optima maxima as they were given, that condition being implied in



in all Rights of Lands that the Vassal should be faithful and Loyal. It has been thought (but upon mistake) That Moveables and other personal Estate should be confiscate in the same manner, without respect to Debts, whereas there is *Dispar Ratio*; Lands, as said is, being given by the Superior with that quality, whereas personal Interests are simply allodial, and ought to be forth-coming to Creditors; who, though they have not a Right to the same, yet have that Interest, that they are the Subject of Execution: and it appears to be unjust, and to obstruct Trade, if it should be otherways.

### Recognition.

**L**ands being Wadset for a Sum, far below the value of the half, with a Back-tack. *Quæritur*, if there be ground for Recognition, if the Land hold Ward? *Ratio Dubitandi*, The whole Lands are Wadset.

If Infeimments of Warrandice be Ground of Recognition?

A Vassal holding Ward, giveth a Charter to his Subvassal or his singular successor upon Resignation, with a *Novo damus*, *Quæritur*, If the *Novodamus* will import a Recognition?

A Gift of Recognition being given of certain Lands, whereupon the Donator is Infeim; and thereafter another Gift being given of the same in favours of another person, who is also Infeim after the former Donator, but prevents by obtaining a Declarator upon his Gift; the former not being declared: *Quæritur*, Which of the Donators will be preferred? *Ratio Dubitandi*, That the first Infeimment seems to be preferable, the Superior being thereby denuded: And on the other part, when Casualties and Escheats are Disposed, which fall *ex delicto* (as the case of Escheats by Horning) There is no consummate Right before Declarator.

Whether an Appealand Heir if he Dispone, and Infeimment follow, the Lands will recognosce? *Ratio Dubitandi*, *Quod nullum est, nullum sortitur effectum*: And not being Infeim he cannot give any effectual Right.

Minors Disposing Ward Lands, *Quæritur*, If they may be Reponed against Recognition? *Ratio Dubitandi*, They ought not to Reponed against *Delicta*, after they are *puberes & Doli capaces*: And such Deeds importing Recognition, are *Crimina & Delicta feudalitatis*.

A Person being Infeim in Ward Lands, with a Faculty and Power to the Disposer to Redeem and Dispone upon payment of a penny, *Quæritur*, If the Disposer make use of that Power and do Dispone, and if an Infeimment without consent of the Superior be taken, whether there be *Locus Recognitioni*? *Ratio Dubitandi*, That he is not Vassal; and the Superior has not consented that he should have, and use that Power.

Lands holden Ward being Wadset for a Sum far beneath the value of the Lands with a Back-Tack, *Quæritur*, If there be place for Recognition, seeing it is intended only, that the Creditor should be secured, and the Back-Tack Duty is within the half of the Rent? *Answer*. It is thought, notwithstanding, that there is ground for Recognition; seeing the whole property is Disposed, and the Vassal has only a Superiority, and is a Tenant only of the Property? And beside, the Superior has that prejudice, that if his Vassal be Year and Day at the Horn, the Liferent of the Property will not belong to him, but only the Liferent of what is payable to his Vassal by the

the Wadsetter by the *Reddendo* of the Wadset Right: and the Liferent of the Back-Tack will fall to the King, and the Vassal may thereafter Discharge both the Back-Tack and the Reversion, so that the Subvassal would have Right to the hail property without the Superiors Consent.

### *Redemption Heretable or Moveable.*

*Quæritur*, If Lands being Redeemable and an order used, will the Sum consigned belong to the Heir or Executor? *Ratio Dubitandi*, *Surrogatum sapit naturam surrogati*, and the Defunct intended that the said Sum should be Heretable being fixed upon Land, and the Debitor had no power to alter the Defuncts Intention, as to the condition of any part of his Estate. It is otherways, when the same is consigned, in Obedience to a premonition at the instance of a Creditor. *Vide. Executry quæst. 2da. in litera E.*

If a Declarator of Redemption doth denude the Wadsetter, so that the Superior without any further Deed, either of Renunciation or Resignation, may Infeft the Granter of the Wadset?

If the Superior has received the Wadsetter, and has given him a Charter bearing the Lands to be Redeemable, will he be obliged upon Redemption to Re-enter the Granter without a Regrefs? *Ratio Dubitandi*, That the Granting of the Charter with that Quality seems to import a Regrefs. *Answer*. It is thought, that it does not import a Regrefs; it being a Provision betwixt the Parties, and to be understood *Civiliter*, that the Superior should not be obliged to Re-enter the Debitor being once denuded, but upon such Terms as he shall think fit, otherways there should be no use for Letters of Regrefs.

### *Order of Redemption.*

**A**N Order of Redemption being used, may the User pass from the same, the other Party being unwilling?

An Order of Redemption being begun, by Premonition at a certain time to receive the Money contained in the Reversion, and before the term the person premonishing being deceased, *Quæritur*, If his Heir being served before the terme, may prosecute and compleat the order by Consignation? *Ratio Dubitandi*, Premonition may seem to be personal. And *e contra*, the Heir is *Eadem Persona*, so that the premonished is not concerned, whether he receive the Money from the Person himself or his Representatives.

### *Reduction.*

**W**Hen a Right is reduced *Ex capite Minoris Etatis*, or Circumvention, or upon any other Ground, so that the Infeftment whereby the Disponer was diseased is taken away; *Quæritur*, If the Disponer must be re-seased? *Ratio Dubitandi*, *Fictione Juris* By the Reduction he is reposed as if he had not been diseased: And on the other part, *Disfina* being *facti*, *quod factum est fieri infectum non potest*: And when Wadsetters

fets are Redeemed; albeit the Right be lousd and extinct by a Decreet equivalent to a Reduction; yet the Redeemer must be released.

After Redemption, What way should the Redeemer be released? Whether upon the Resignation of the Party infest upon the Wadset; Or what other Way? *Answer*, Wadsets were of old granted upon Reversions not contained in the Body of the Right; and then the Disposer was in use to get a Regress, whereupon the Superior did re-enter him; but now the Reversion being in the Body of the Right, the Disposer is in the same case as if he had a Regress, and should be infest in the same manner: The Wadsetter being denuded by the Decreet, he has no Right in his Person to resign: and therefore it is thought, that the same course should be taken, both in the case of Redemption and Reductions, as formerly, when Regresses were in use.

### *Reduction Ex capite Fraudis.*

**I**F a Reduction be pursued of the Right as Fraudulent, may not the Defender alledge, that the Disposer had *Bona*, either Movables or others equivalent to the Debt, which may satisfy the same; and offer to satisfy the Pursuer upon an Assignment of the Debt due to him; to the effect he may have Recourse against the said other Estate of his Author? *Answer*. It is thought, the said Defences would be relevant, and Assignations could not be denied.

### *Infestment after Reduction.*

**A** Person having disposed Lands and resigned, and being so divested by Charter and Seafine, If he should thereafter reduce the said Right; *Queritur*, what way he shall be released, Seing the Right was not *his Nullum sed Annullandum*: and the Seafine and Resignation that divests is *Factum quod non potest fieri infectum*?

### *Reduction Ex capite Metus.*

**Q***ueritur*, If Rights being made *dolo vel metu*, and upon these Heads or *Ex capite Lesti* being reduceible; and such Actions being *in rem*, a singular Successor acquireing a Right from the person lyable to such actions will he be in the same case as Persons acquireing from Confidents? *Ratio Dubitandi*, Acts of Parliament are *stricti Juris*, and cannot be extended.

### *Reduction upon Minority.*

**I**F Interlocutors *in Jure* against Minors may be reduced *ex capite Minoris* *etatis* and Læson? *Answer Negative*, Seing Minors cannot be restored, but where either there is *captio* by the deed of another to their prejudice; or by their own deed, through their Facility; or where there is an omission of Defences: But where Defences are not omitted, and being proponed and advised are repelled as not relevant, The Interlocutor, which is a Deed of the Judge, cannot be reduced but upon iniquity.



## Reduction Ex capite Lecti.

**A** Father having acquired a Right to his Eldest Son of certain Lands, reserving his own Liferent, and a Power to dispose *etiam in articulo mortis*: And thereafter having on Deathbed made use of the said Faculty, and disposed the said Lands to a second Son, *Queritur*, If the said Right may be questioned by Reduction *Ex capite lecti*, as being made in prejudice of the Heir? *Ratio Dubitandi*, That the said Disposer could not do any Deed then, in prejudice of his Heir; And on the other part, that the eldest Son, having accepted the said Right with the said Provision, cannot question the same. *2do*. The Heir is not in this case to be considered as Heir, but as *quilibet*, Seing he is not in the case of an Heir succeeding in a Right as Heir, seing the Right was not in the Person of his Father; and he himself was Fiar with the quality forsaied. *3tio* The Law of the Majesty is only in the case of Rights granted to a Person and his Heirs simply; and the reason of the Law is expresse, that the Defunct, when he was in health having had no thought to dispose of his Heretage, when he grants Rights on Deathbed of the same, is presumed to have been imposed upon, or that the said Rights on Deathbed were Elicite, or granted by him *in Delirio & fervore passionis instantis*: Whereas the said Faculty, being reserved in the Right, argues the Fathers intention *ab initio* if he should think fit even then *etiam in articulo*, being *sedati animi*: Nevertheless the said Right was reduced. *Davison contra Davison. November 1687.*

## Re-entry after Redemption.

**I**F Wadset Lands be holden of the Superior, and the Reversion be contained in the Charter; If the said Reversion be not equivalent to a Regress in respect of the Superiors consent to the same? And what way the Vassal may be entered upon the Redemption, especially if the Creditor be dead; and his appearand Heir will not grant a Renunciation, and cannot resign? *Answer*. The Superior may be urged to grant a Charter, making mention of the Wadset, Redemption, and Declarator, and by Law that he is lyable to re-enter, the Vassal having redeemed.

## Regalia.

**M**ajora Regalia coherere dicuntur Imperatoris offibus, ut ab eo avelli nequeant.

*Imperator alios sibi assumere potest in partem Sollicitudinis, non vero in plenitudinem Potestatis, quæ omnem respuit Divisionem; & quasi Sanctum Sanctorum est, in quod nemo admittitur nisi Princeps. Bes. Thes. in Litera K. 3. verbo Kayserliche, P. 450.*

*Integra Territoria, seu Provincia, Ducatus, Principatus, Comitatus &c. cum Jurisdictione territoriali in feudum Statibus Imperii, Ducibus, Principibus, & Comitibus, & Civitatibus Imperialibus conceduntur: cujusmodi feuda Imperii immediata, omnia regalia Jura & Emolumenta eo spectantia continent. Frit: Jus Fluviat. P. 106. n. 3.*

Regalia

*Regalia non sunt Res, sed Jura Regi aut alii Superiorem non recognoscenti, in signum supremæ potestatis, necnon in præmium immensi laboris, quem pro Imperio & Regimine sustinent, ad Rempublicam tuendam competentia.* Heringius de Molendinis. q. 9. n. 47. & sequen.

### Regality.

**I**F Rights of Regality imply and import a Right to Escheats upon Horning, albeit they be not express thereanent? *Ratio Dubitandi*, It is the common Opinion, that they are imported: *Ex adverso*, Gifts of Escheat upon Rebellion are *inter maxima regalia*, and Rights of the same are *stricti Juris*. 2do. All Letters of Horning bear, That the Rebels Goods should be escheat and brought in for His Majesties use. 3tio. Regalities being Priviledges of Jurisdiction, and Exemption from the ordinary Courts of Shires and Justices, carry only such Escheats as are incident to Jurisdiction, as Mulcts and Fines of persons unlawed, or sentenced in Courts of Regality. 4to. Declarator of Escheats cannot be pursued before Regality-Courts but only before the Session. 5to. In other Cases of Escheats, upon account of Crimes or Delicta, as for Theft, Slaughter, &c; the Crime is not against the King directly, but consequentially, as concerned in the Loss of a Subject: But Rebellion on Horning is directly against the King. It will be fitt to see the Right of an Ancient Regality.

Suppose that the Lord of Regality has Right to the Escheat upon Horning, will he have Right only to such Movables, as are within his own Territory, Or to all the Rebel his Movables, even such as are within the Regalities of others?

If a Right of Regality may be granted, not only for Lands holden of the King, but for such as hold of other Superiors? *Ratio Dubitandi*. That the King being the Fountain of all Jurisdiction, in whatsoever Lands or Bounds, whether they hold immediatly of himself or not, may delegate and give that Jurisdiction to whom he pleases, whether the Lands hold of himself or not. And on the other part, the said Jurisdiction being annexed to the Lands and given *intuitu* of the same, it is hard that a Vassal should be above his Superior; and his Superior being it may be Baron, a Right of a Barony-Jurisdiction cannot be given *in eadem Baroniam*; and far less of a higher Jurisdiction: And no Right can be given to a Vassal in relation to his Lands, but such as would pertain to his Superior, if the Lands come in his hands by Non-entry or otherwise: And the Right of Regality, which did never pertain to the Superior himself, cannot come in his hands by Non-entry or otherwise.

*Writs registrate, that cannot be found in the Register.*

**I**F it be Evident that a Writ was put in the Register, and yet cannot be found, neither Principal nor Booked, What Remedy?

Re-

## Registratio.

“ **A** Pud nos Instrumenta aut Literæ Registrari dicuntur, cum referuntur  
 “ in Regestum sive Librum publicorum, vel actorum vel monumen-  
 “ torum. Registratio autem celebratur duobus modis, & ad diversos fines  
 “ & effectus.

“ Ubi enim Instrumentum sive simplex & *μειζων*, obligatio scilicet  
 “ aut Chirographum aut Dispositio; aut *δευλων*, contractus scilicet  
 “ inter duos aut plures, in librum actorum refertur; & plerumque fit ut  
 “ vim & instar sententiæ obtineat, & executionem paratam, virtute clau-  
 “ læ Executiæ & Registrationis (ut vocant) in omnibus fere instrumen-  
 “ tis solennibus, istis aut similibus verbis. *viz.* Et pro majori securitate &  
 “ nos (ii scilicet qui obligantur) volumus & consentimus ut præsens In-  
 “ strumentum inferatur & Registretur in Libris Supremæ aut inferioris Cû-  
 “ riæ competentis, ut ita nanciscatur vim sententiæ Dictorum Judicum, ut  
 “ Literæ Denunciationis & Cornuationis (ut practici loquuntur) conti-  
 “ neutes spatium sex dierum & alia necessaria (ut par est) pro ea exse-  
 “ quenda Dirigantur: & constituimus

aut eorum quemlibet Procuratores

“ nostros ad effectum prædictum.

“ Sic sine lite & processu, ad ultimam processum metam & exitum deve-  
 “ nitur, sententiam scilicet & Executionem omnimodam; fictione enim  
 “ brevis manus omnia ad processum & sententiam requisita quodammodo  
 “ insunt: vice enim Citationis (quæ supervacua, est ubi partes præsto  
 “ sunt & consentiunt) procurator etiam, Rei intervenit, dicis causa, &  
 “ consentit; Judex etiam secundum Instrumenta exhibita per procurato-  
 “ rem, eoque postulante ut juxta Clausulam prædictam, ad effectum præ-  
 “ dictum, in Regestum referantur, decernit: actuarius etiam & Clericus  
 “ Curie decretum seu Extractum expedit.

“ Illud autem tribus partibus constat. *1<sup>mo</sup>* Enim præmittitur decretum  
 “ eaque sequitur formâ, *Edinburgi* die Mensis *16* Co-  
 “ ram Dominis Concilii & Sessionis comparuit, *T. W.* Advocatus procu-  
 “ rator pro *D. P. W.* Obligato in Chirographo infra scripto, & exhibuit  
 “ dictum Chirographum, petiitque illud inferi & Registrari in Libris  
 “ Concilii & Sessionis ut vim sententiæ dictorum Dominorum obtineret ei  
 “ interponendam; qua literæ Cornuationis & aliæ necessariæ desuper di-  
 “ rigantur modo inibi specificato; quam postulationem dicti Domini Ratio-  
 “ ni consonam Judicarunt, ideoque ordinavere & ordinant Dictum Chiro-  
 “ graphum inferi & Registrari in libris dictæ curiæ, & decrevere illud ob-  
 “ tinere vim sententiæ ipsorum, & Literas Cornuationis & alias necessarias  
 “ inde dirigi modo infra-scripto. *2<sup>do</sup>*. Subjungitur Tenor ipsius Chiro-  
 “ graphi. *3<sup>io</sup>*. Sequitur Clausula ista *viz.* Extractum de libro actorum  
 “ per me. *viz.* Vel Dominum Rotulorum Clericum Registri, vel ejus De-  
 “ putatum Clericum, qui subscribit nomen suum.

“ Instrumento autem Registrato, autographum seu originale a Clerico  
 “ retinetur in publica custodia; Exemplari (ut superius diximus) Extracto  
 “ & Creditori dato, ex quo executio sequitur tam realis quam in perso-  
 “ nam: nec absimile est illud Extractum Instrumento Guarentigato, cujus  
 “ sæpe mentio habetur tam apud Jurisconsultos quam Practicos; ex eo enim,  
 “ non minus quam ex sententia solenni, Executio parata est.

“ Cate-



“Cæterum omnis definitio in Jure periculosa est, & Juris remedia etiam  
 “optima interdum remedio indigere videntur; nec Registrationis saluber-  
 “rimo instituto suum deesse videtur incommodum: Instrumenta  
 “enim cum in publica custodia sint, Incuria Clericorum, aut fervorum  
 “fraude facile intercidunt aut subtrahuntur; ea autem perdita esse subor-  
 “dorati debitores aut eorum hæredes, actione Falsi (eam Improbationem  
 “dicimus) intentata, sæpe liberantur; nulla Judicis sed summa actoris &  
 “reapse injustitia. In causa enim Falsi agitur, ut exhibeatur Instrumentum  
 “de quo quæstio est; ea, in libello, comminatione (seu ut practici lo-  
 “quuntur Certificatione) nisi exhibeatur irritum fore, nec ullam ejus Ra-  
 “tionem aut fidem habendam esse in Judicio vel extra Judicium. In ista  
 “autem causa Falsi, haud satisfacit Exhibitio exemplaris rite Extracti; nec  
 “immerito & sine ratione; Instrumentum enim ipsum multa fortasse suffice-  
 “ret argumenta, tam ad veritatem astruendam quam ad falsitatem argu-  
 “endam, ex comparatione Literarum, & Subscriptionibus Testium &  
 “Partium; & alia plurima quæ Extracto tantum exhibito desiderantur.

“Hac Ratione impulsus neq; provisus incommodis pluribus & graviori-  
 “bus (ut omnis mutatio etiam in melius est periculosa) Angli Judices  
 “tempore nuperæ Usurpationis (si fas est prædonēs & perduelles Judices  
 “vocare) in res novas semper prurientes (annitentibus maxime *Scotis* qui  
 “eis assidere ut Collegæ haud erubuerunt) statuto sancierunt, Instru-  
 “mentum ipsum exhibendum quidem, ut in acta referatur, Creditori red-  
 “dendum ut penes eum remaneret.

“Registratio enim cum sit actus voluntariæ Jurisdictionis quolibet tem-  
 “pore etiam feriarum explicatur, non tantum extra Judicium, sed nec ullo  
 “alio fundamento nititur nisi consensu partium, & clausula Registratio-  
 “nis in Instrumento ipso inserta; Instrumento autem penes Creditorem  
 “remanente nec in custodia publica asservato sententia esset inanis sine  
 “ullo probationis adminiculo quod in actis sit. Adhæc, eadem & majora  
 “sequerentur incommoda; sæpe enim non tantum ejus penes quem Instru-  
 “mentum est, sed aliorum interest ut servetur, prædiis forte hæredibus  
 “Taliæ & Provisionis ita dispositis ut multi sint gradus Substitutionum:  
 “eo, & multis aliis casibus tutius esset & æquius, Instrumentum illud in  
 “publica custodia esse, ut sic omnibus quorum interest consultum sit,  
 “quam Instrumento penes unum retento, ejus negligentia vel dolo reli-  
 “quorum Jus periclitari.

“Præterea, Creditore penes quem Instrumentum est, decoquente, & cum  
 “Debitore suo colludente (ut id genus hominis fallax est) facile esset  
 “illudere Creditoribus suis, qui Instrumentum istud per adjudicationem  
 “sibi addici obtinuerunt, Instrumento, in causa Falsi consulto intentata,  
 “haud exhibito.

“Mihi autem in isto Recessu & unice satagenti quomodo prodesse ut-  
 “cunque possim, videtur; omnibus quorum interest consultum fore, & in-  
 “commodis & commentis quæ ultro citroque adduci possunt obviam iri,  
 “si tempore confictionis Instrumenti ejus Copia aut exemplum describa-  
 “tur, ab eo qui Instrumentum ipsum scripserat, & ei subjiçatur brevicu-  
 “lum seu brevis nota ab eodem scriptore scripta, iisdem partibus & Testi-  
 “bus Subscribentibus, & ejusdem Datæ; eo qui sequitur aut simili tenore.

“Nos vero (obligati scilicet in Instrumento) agnoscimus Copiam supra-  
 “scriptam, verum esse & integrum exemplar Instrumenti seu Contractus

“inter nos confecti ejusdem datæ & tenoris; & volumus & consentimus  
 “ut virtute claululæ Registrationis in dicto Contractu insertæ, nec non vir-  
 “tute præsentium ut prædictum Instrumentum coram curia exhibitum  
 “in Libris Curie Registretur, habiturum vim ad effectum superscrip-  
 “tum: nec non volumus & consentimus, quod extractum præfati Instru-  
 “menti in omnibus causis etiam Falsi & Improbationis exhibitum, una cum  
 “isto Breviculo, sufficiens erit & efficax ad omnes effectus, haud secus  
 “quam si Instrumentum ipsum exhiberetur aut productum, satisfaceret.

“Registrantur Instrumenta non tantum Executionis sed custodiæ causa,  
 “& ad futuram rei Memoriam; ut plerumque fit in Acceptilationibus &  
 “Apothis, quando concedens ad nihil faciendum obligatur, adeo ut Exe-  
 “cutione haud opus sit; ne tamen intercidant, consentit ut ad futuram rei  
 “memoriam, in libris actorum inserantur & asserventur.

“Registrantur etiam Instrumenta nec Executionis nec custodiæ sed In-  
 “sinuationis ergo; idque summa ratione & necessitate nedum utilitate;  
 “unusquisque enim scire debet conditionem ejus cum quo contrahit  
 “juxta regulam Juris.

“Id autem scitu difficile est, isto tempore Candoris & Bonorum Morum  
 “effeto, Fraudis autem feraci; sæpe enim eveniebat ut comparatis prædiis  
 “ut optimis maximis, nec circa justum & maximum pretium, emerge-  
 “rent qui sibi Jus in iis vindicarent, vel Dominii vel Retractus seu Rever-  
 “sionis; sic iis vel evictis vel modica pecuniula redemptis Emptor delu-  
 “sus tam Terris quam pretio carebat, actione adversus venditorem plæ-  
 “rumque inopem prorsus inani. Scire igitur expedit conditionem rei de  
 “qua contrahitur, an sit penes Disponentem & penitus sua, nec aliena sit  
 “vel Jure Dominii, nec Hypothecæ nexu aut annui redditus aut alio onere  
 “gravata; aut Retractui aut Reversioni obnoxia: Nec minus cognitu  
 “necessaria est conditio vendentis aut alterius contrahentis, licet enim Do-  
 “minus sit & Dominium sit potestas de re sua Disponenti, Juxta regulam  
 “Juris, *quilibet est Rei suæ Arbitrarius*, subjungitur tamen in ista Regula *Nisi*  
 “*Lex obstat*; Lex autem obstat Dominis ne de rebus & Terris suis  
 “libere disponant, Legum vinculis forte præpeditis, Inhibitione scilicet,  
 “quando in rem & ad instantiam Creditorum inhibiti sunt: aut in rem  
 “suam & suorum hæredum iis bonorum suorum Administratione inter-  
 “dictum est: aut quando Rebelles Denunciati sunt & Exleges: De quibus  
 “impedimentis alibi & suis locis disseruimus.

“Ut autem incommodis ex ignorantia tam conditionis rei quam perso-  
 “næ obviam eatur, utque conditio utriusque innoscatur, plurimis Constitu-  
 “tionibus & Legibus enixe cautum est.

If a Disposition may be Registered, the Disposer being on Life but the  
 receiver being Deceased? *Ratio Dubitandi*, Registration is to the effect it  
 should have the force of a Decree, and there can be no Decree in favours  
 a Dead Person.

### *Regum Contractus.*

“Contractus Principis habet vim Legis, quoad observantiam; immo po-  
 “tentior est Lege intensive; quia ligat successorem, quod Lex non fa-  
 “cit: secus vero extensive, quia Lex ligat omnes Contractus.

“Regius etiam ex lege successor, factum Principis antecedentis princi-  
 “pali

"pali nomine peractum, ejus licet non sit hæres, ratum ut habeat conveniens  
"est: alioqui publica fides, & dignitas principalis collaberetur, *Thef. Besold.*

"p. 549.

"Reges absoluti non litigant depofsessionati, *Le Roy plaide saisi, Thef.*  
"Bes. p. 560.

### Relief of Cautioners.

**I**F Cautioners finding the principal to be in a worse condition, may pursue for Relief before Distress? At least to be secured out of his Estate?

### Relocation.

**A**Tack being fet and the Setter being deceased. *Queritur*, If after his decease, and no person being Heir to him, the Tacksman may be said to bruik *per tacitam Relocationem*; seeing there is none that can be said to be *Relocans*?

### Relutio seu Retractus.

**I**Nter Juris Interpretes celebris est Contraversia de Jure reluendi, seu Retractus, quod apud nos Reversio dicitur, an ei præscribi possit? qui affirmativam tuentur; regulam; qui negativam, exceptionem, Sententia sue fundamentum adducunt; Regula est, Omnes actiones, omnia Jura etiam maxime longæva, longissimo tempore, id est lapsu quadraginta annorum præscribi & extinguui. Exceptio est, Ea quæ sunt meræ facultatis haud præscribi. Apud nos *lis ista* sopita est; Constitutione enim Regis, Jacobi Sexti Act. Parl. 12. 1617. Cavetur omnia Jura Contractus & inter alia Reversiones & Retractus, & ex iis actiones, 40. annis præscribi; Exceptis Reversionibus quæ sunt in corpore Juris, & investitura excipientis; & iis etiam quæ insinuata & in Archiva publica & regestum relatæ sunt: quibus casibus (cum nulla subsit suspicio falsitatis, ut ait Lex ista) actiones ex iis statuitur esse perpetuas. Sed cum Contractus, Chirographa seu obligationes, præscribantur, licet insinuatione publica & in archivis sint, qui sit ut ubi eadem & par est ratio dispar Jus sit?

### Remissions:

**I**F the Exchequer, when Remissions are not given by the King, may grant Remissions *sine causæ cognitione*, upon a Letter of Slains?

If Remission can be given for Murder? *Answer*. The Kings Power is not limited: but in Justice, Remissions cannot be given, but in the cases that by the Divine Law, and Law of Nations, the benefite of the Sanctuary may be competent: Whereas by Act of Parliament, there is no Sanctuary for fore-thought Felony.

### Renounciation.

**Q**Uæritur, If the Father or his Executor may urge the Daughter who has renounced, to confirm her self Executrix to her Mother, to the effect



effect her Renunciation may be effectual? *Vide of nearest Kin. Quæst. 454. litera K.*

### *Renunciation by Daughters at their Marriage.*

**I**F a Man have a Son and Two Daughters; and both the Daughters Renounce all Executry, Debts, Goods, and Gear whatsoever, either provided to them, or which may fall or pertain to them by the Decease of their Father or Mother, *Quæritur*, If the Son will be both Heir and Executor?

If a Person charged to enter Heir and renouncing, may notwithstanding be served Heir? *Answer.* He may be served: and no other person or Creditor can oppose, upon pretence of the Renunciation, seeing Charges to enter Heir are Personal Diligences as to the Chargers only: and Renunciations in obedience thereto do militate only in favours of the Chargers.

If the Charger may oppose? *Answer.* If he has any prejudice or Interest he may oppose; but it is thought he can have none, seeing notwithstanding of the Service, what is done upon the Charge, or Renunciation will be effectual; and the Renunciation is *actus involuntarius* for Obedience: and with us there is not *Locus successorio Edicto*: And it were hard if *Hæreditas* should be *Opulenta* that the Heir could not Enter.

### *Renunciatio Juri Publico.*

*Renunciare potest Debitor immunitati Nundinarum; quia licet favorem publicum habeant nundinæ, principaliter tamen de privatorum commodo agitur: & regula communis est, Quoties privato favori Lex aliquid introducit principaliter, licet secundario publicam causam annexam habeat, Renunciari huic favori posse. Thef. Bef. Litera M. 43. §. 631.*

### *Res Fiscales & res private Regis.*

*Regalia & res Fiscales, & res private Regis, magno intervallo inter se distant; ex enim sunt privati Patrimonii, quæ Principi ratione personæ & non ratione dignitatis obveniunt; At quæ Rex ex suis provinciis & ditionibus, ut Rex vel Princeps percipit, ea ad ipsius Patrimonium Fiscale pertinent, nec ad hæredes transeunt licet in rebus privatis succedant, nisi etiam in principatu succedant. Hering. de molend. quæst. 9. n. 71.*

### *Re-seasin upon Reduction.*

**A** Right being granted to be holden of the Superior; and after Infeffment, being reduced *Ex capite Doli vel Metus. Quæritur*, Whether the former Right revives, Or if there must be a new one, what way is it to be taken? *It is Answered.* That it is thought, that the Seasin being taken away, and being *Facti* which cannot be *infectum*, there must be a new Seasin; and the Superior is to be dealt with to give a precept, making mention

mention of the former Seafin and Decreet of Reduction; and that he is willing to receive again the Disponer.

If the Disponer be deceased *Quomodo* shall his Heir be infeft? *Answer.* Being served Heir he may apply to the Superior, for a Precept mentioning as said is, and that he his Heir.

If the Lands be holden of the King, what course should be taken? *Answer.* upon application to the Lords by Bill, they may grant warrand to the Directors of the Chancery, to give precept of the nature foresaid.

If the Superior may be forced to receive his former Vassal in the case foresaid? And if he should, will Composition be due? *Answer.* It is thought, that he ought to receive him but upon composition; seeing having once entered his Vassal, he is not obliged to Re-enter, but upon Composition.

### Reservation in favours of Relicts.

**B**Y Contract of Marriage, a Lady having accepted a Liferent-provision, in Satisfaction of all she could claim, either of Terce or Moveables, excepting and reserving the third of the plenishing of the House, *Quæritur*, whether by the said reservation she has a Right settled in her person to the third of the Plenishing, free of debt and moveable Heirship? Or if the said Third be only understood of free gear, the debt being payed, and Heirship deduced? *Item* if the said Third be lyable to a Bairns part, if all the Executry be exhausted but the said Third?

### Resignation.

**I**F a Superior, who is a singular Successor, may infeft upon a Resignation in his Authors hands, as upon a Comprising the time of his Authors Right?

If a Superior has given a Charter upon Resignation whereupon there is no infeftment, *Quæritur*, If he be denuded of the Superiority, will the singular Successor therein, be obliged to renew the Right, and to grant precepts to that effect, and by what action he may be urged?

*Quæritur*, If after Resignation, the Disponer and the Person in whose favours the resignation is made, may agree and recede from their bargain without consent of the Superior, upon pretence that the Resignation is *in favorem*; and every Person may renounce *Juri pro se introducto*? *It is thought*, They cannot & *res non est integra*, there being a *quasi contractus* betwixt the Superior and them.

If after Resignation accepted, the Superior be denuded, whether his Successor will be obliged to infeft him? And what way he may be urged? *It is thought*, That *Succedit in rem cum sua causa*, and upon a Bill to the Lords there may be a warrand to direct precepts, as upon a Retour.

If an Instrument of Resignation *in favorem*, will prejudice a singular Successor, seeing it is not Registrat?

## De Resignationibus.

## Quæstio Prima.

*An Resignatio, in Manibus Domini Superioris, alienantem penitus deveſtiat?*

“**A** Lienato prædio, & ex mandato in Instrumento Alienationis inserto, Resignatione subsecuta, & a Domino directo admissa, *Quæritur*,  
 “An ea Alienantem ita deveſtiat, ut nullum Juris vestigium penes eum  
 “superſit, nec eo mortuo aut delinquente, custodia hæredis minoris, aut  
 “Maritagium, vel alia emolumenta Domino directo obveniant?  
 “*Respondere viſum eſt*, Alienantem penitus deveſtitum & Dominio utili  
 “exutum; nec ex ejus obitu vel delicto, obventiones (quæ sunt Domini  
 “directi fructus) deberi Domino directo: omnia siquidem, quæ Vaſalli  
 “ut deveſtiantur facere solent aut debent, rite peracta sunt: nec obest  
 “quod unius interitus eſt alterius ortus, nec Jus proprietatis & Domini  
 “directi a Domino discedit, nisi alii acquiratur; dici autem nequit Emp-  
 “torem aut eum cui Alienatio facta eſt, Dominum aut Vaſallum eſſe, an-  
 “tequam a Domino directo inveſtitus & ſaſitus ſit; Jus siquidem nedum ad  
 “rem, per alienationem quaſitum eſt ei in cujus favorem Resignatio facta  
 “eſt, ſed tantum non in re; & inchoatum eatenus, ut feudum ſit penes  
 “Dominum directum, quaſi per fideiſcommiſſum, & in rem ejus cui  
 “alienatio facta eſt, ita ut eum ejusque hæredes inveſtire teneatur: & in  
 “Jure quod prope eſt, multis caſibus idem cenſetur.

## Quæſtio Secunda.

*An ex Persona Reſignatarii, & ejus vel obitu vel delicto, Custodia Hæredis & alia emolumenta Domino directo obveniant?*

“**S**I poſt Reſignationem a Domino directo admiſſam, nihil commodi ei  
 “obvenit vel ex obitu vel delicto alienantis, quia Vaſallus eſſe deſiit,  
 “*Quærendum*? An ſaltem ex obitu vel delicto ejus cui Alienatio facta eſt,  
 “custodia & Maritagium hæredis, uſusfructus ex Rebellionem per Annum  
 “& Diem, aliæque obventiones ordinariæ & ſolennes ei cedant quæ de-  
 “bentur cum Vaſallus vel moritur vel deliquit: nec Vaſallus dici poteſt,  
 “quia nunquam ſaſitus fuit; Juxta tritum illud, *nulla ſaſina nulla Terra*:  
 “Verius tamen & Juri conſentaneum videtur, eo tempore quo per Reſig-  
 “nationem, Terræ ſunt in manibus Domini ſuperioris, Jus & Dominium  
 “directum haud ſterile & effectum eſſe: & ejus fructus ei haud negari de-  
 “bere, iſto colore vel captionem, quod alienans deveſtitus Vaſallus eſſe de-  
 “ſiit, Emptor autem nondum Vaſallus eſt: nam ſi Domino nec renuente  
 “nec cunctante, per eum non ſtet quo minus Emptor inveſtiatur, Emptore  
 præ-



"præmortuo vel negligente, vel fato vel ejus negligentia imputandum  
 "quod Vasallus non fuerit & investitus: ubicunque enim de Domini  
 "commodo agitur, pro investito habetur qui a Domino parato investitu-  
 "ram haud petiit, nec ejus mors vel mora Domino obest: hac ratione  
 "hæres Vasalli hæreditate haud agnita, si ad pubertatem pervenerit, ejus  
 "Maritagium Domino debetur; & ex ejus delicto, vel usufructus vel  
 "prædium ipsum ad Dominum pertinet, etsi nunquam ei Vasallus fuerit:  
 "id quidem interest inter hæredem ejus qui Vasallus & in feudo investitus  
 "obiit, & hæredem Resignatarii; quod in illum, feudum quod decessoris  
 "fuerat renovatur & transmittitur; in isto vero feudum incipit; nec est  
 "Hæres Emptori, in feudo quod ejus nunquam fuerat: Verum illud faci-  
 "le diluitur, quemadmodum enim in Jure qui in utero est, ad varios effectus  
 "fictione Juris pro jam nato habetur; haud secus ubi feudum constituitur  
 "& eo nascendo maturuit, ut ab alienante abdicatum & in manibus & pe-  
 "nes superiorem sit; sed ea lege & fiducia, ut acquirenti novum infeofa-  
 "mentum concedatur, pro enato habetur; nedum quoad superiorum &  
 "compendia & emolumenta ad eos pertinentia; sed ad quosdam alios ef-  
 "fectus; Hæres enim Resignatarii qui morte præreptus decessit sine sa-  
 "fina; & etsi primo investitus sit ex alienatione, succedit tamen in Jus acqui-  
 "rentis & non suo sed Jure hæredis; & fictione brevis manus feudum nan-  
 "ciscitur ut hæreditarium: Haud secus quam si Acquirenti investito, ipse  
 "(eo mortuo) ut hæres investitus fuisset; ideo feudum in ejus persona  
 "haud novum & Conquestus, sed hæreditas censetur: Et si decesserit  
 "orbis & sine liberis ad Agnatos ex latere descendit. Adhæc, licet feuda  
 "plerumque Acquirenti sint libera, ut de iis pro arbitrio suo Disponere  
 "possit hæredibus: quædam vero sunt fideicommissaria & vinculata, ut nec  
 "alienari nec ære alieno gravari possunt; Feudum tamen haud ut liberum  
 "consequitur, qui parente præmortuo primus ex Alienatione investitur; sed  
 "si Conditionatum sit, conditionibus parere debet; & nisi paruerit feudo  
 "multandus ex lege Commissoria seu Clausula irritante; adeo in Jure  
 "spes proxima & radicata multum attenditur & operatur: & acquirenti  
 "nedum spes sed ex Resignatione Jus, adeo radicatam fuit, ut Resignata-  
 "rio & ejus hæredibus, & Jus ab eo habentibus auferri vel avelli nequeat:  
 "& Domino necesse sit feudum iis per Investituram tradere qui primi  
 "erant per Resignationem: dumque Vasallus ex Charta & præcepto  
 "safinam & traditionem operitur, interim umbra quædam traditionis præ-  
 "cedit, fundo Domino sursum reddito per fustis & baculi traditionem, in  
 "favorem acquirentis, & statim per idem symbolum rursum reddito Re-  
 "signatario aut ejus procuratori.

### Quæstio Tertia.

*An in Feudis, quæ de Domino Rege tenentur, idem  
 Jus sit, adeo ut per Resignationem Vasallus  
 deveſtiatur?*

"AN in omnibus Feudis, five ea de Rege five de aliis superioribus te-  
 "neantur, idem Jus sit, operæ pretium est quærere? Et quidem ubi  
 eadem

"eadem ratio idem Jus est, & a contrario ubi dispar ratio diversum Jus.  
 "Id autem nec parum est discriminis inter Dominum Regem & alios su-  
 "periores; quippe hi rerum suarum providi & satagentes, sua Jura & com-  
 "moda scire & debent & presumuntur, si nesciant aut negligant suo pe-  
 "riculo & dispendio est: Rex vero in id unice intentus ut Regno bene  
 "sit nec quid detrimenti capiat, Eaque Reipublicæ mole obruitur ut rebus  
 "suis & privatis superesse nequeat: Quin & Quæstor & Proquæstor  
 "aliique quibus sacri Patrimonii procuratio demandata est, viri Illustres  
 "& impigri in omnibus fere Curiis Regis assidui & impliciti; tot negotiis  
 "distinentur, ut nedum supra vix omnibus pares esse queant: Hinc  
 "Obreptio & Subreptio, vitia in largitionibus principum sæpe sed frustra  
 "vetita: hinc etiam negligentia, haud ex socordia quæ in viros amplissi-  
 "mos & diligentes non cadit, sed reipsa, ut quibusdam casibus dolus, etiam  
 "sine dolo & reipsa esse dicitur: Ideo Constitutione Regis *Jacobi Sexti*:  
 "*Parliamen. 16. Cap. 14.* necesse fuit cavere, Ne Officiariorum & Mini-  
 "strorum Regis negligentia Regibus noceat: consultum igitur videtur  
 "esse, nec rimam relinquendam qua irrepant, nedum portam aperi-  
 "dam qua erumpant fraudes; id autem futurum, si statuatur ex Resignatio-  
 "ne in manibus Regis (aut eorum quibus id munus commisit ut Resigna-  
 "tiones recipiant) Vassallum penitus devestitum esse; nam Resignatio  
 "ista sit nulla indagine aut inquisitione prævia, quænam sit Resignantis aut  
 "Feudi conditio; an is æger vel moribundus, & forte nothus aut Bastar-  
 "dus; an vero Feudum Jure aliquo affectum sit, aut obventionem ante  
 "Resignationem debita & cedente, aut Regi caducum & commissum ex  
 "delicto; sic haud difficile erit Regem fraudare imo ludificare, *E. G.*  
 "Resignatione feudi militaris facta a Vassallo, cui hæres sit infans aut im-  
 "pubes, in favorem Emptoris simulati, si præmoriatur alienans, causabi-  
 "tur Emptor eum devestitum, nec hæredis impuberis vel Custodiam vel  
 "Maritagium obvenisse: Sin Resignatarius morte præreptus sit, alienans  
 "dicit se haud devestitum, nec de Alienatione aut Resignatione constare;  
 "notarius siquidem qui Resignationibus faciendis adhibetur plerumque  
 "obscurus, & ejus opera utentibus addictior est: Contractus autem vel dis-  
 "positio ex qua Resignatio fit, penes contrahentes remanet, & cum sine ea  
 "Resignatio inanis sit, ea celata vel deleta facile erit rem eo redigere, ac si  
 "nec Alienatio nec Resignatio celebrata fuisset; & prout ex re eorum vide-  
 "bitur, & magis commodum, Colludentium arbitrium erit utrum  
 "alienans an vero acquirens eorumque hæredes Regi Vassalli forent; Ut  
 "est in Apologo de homine fallaci & dolo ancipiti numen ipsum fallere  
 "auso, & periculum facere an omnia sciret & vera responderet; cum enim  
 "sub vestis lacinia passerem haberet, sciscitatus est, an avicula quam habe-  
 "ret viva an mortua esset, certus, si Oraculum vivam diceret, eam necare  
 "illiso cerebro; sin mortuam, promere vivam: Responsum penes eum esse  
 "utrum vivam an mortuam malit: sed mille sunt nocendi & fraudandi  
 "artes, quas referre nec tutum est sæculo isto in fraudes nimis prono, cum  
 "vel memorare docere sit: verum re penitus inspecta videtur *Responden-*  
 "*dum*, idem Jus esse in omnibus feudis, nullo inter Regem & alios supe-  
 "riores discrimine, nisi quoad accidentalialia quædam & extrinseca, de qui-  
 "bus non curat Lex; Eadem autem est utrobique ratio; ea scilicet, post-  
 "quam Vassallus devestitus est Alienatione, & ex ea Resignatione facta &  
 "admissa; ex ejus vel delicto vel obitu, nihil vel commodi Domino directo,

vel

“vel incommodi acquirenti posse evenire; Rex enim licet supremus, et  
 “ut *Angli* loquuntur *Superior paramount*, in Feudis sive dandis sive renovan-  
 “dis Jure haud Prærogativo sed communi utitur: Et cum sit fons Juris-  
 “dictionis, quod Juris in alio statuit, eo uti haud gravatur: Nec obstant  
 “quæ attigimus Incommoda; nec Incommodum Argumentum, nedum  
 “Jus solvit; ea hominum forte, ut nihil humani incommodi expers &  
 “vacuum sit: Imo inter regulas Juris ea est, *Omnem Definitionem in Jure*  
 “*periculosam*, adeo ut vix fieri possit quin aliquo incommodo subver-  
 “tatur: Ex adverso, haud defunt incommoda multa & gravia; in isto  
 “igitur conflictu, ut præsumptiones leviores & debiles fortioribus cedunt,  
 “ita incommoda aliis & gravioribus diluuntur: Si igitur aliter statuatur,  
 “quæ populo & acquirentibus timenda sunt incommoda magis prægra-  
 “vant; Rex siquidem de lucro captando, hi vero agunt de damno vi-  
 “tando; Rex de obventione & lucello casuali, & directi Domini fructi-  
 “bus jactura levi & facili refarcienda; aliis subinde renascentibus.

### Quæstio Quarta.

*Si Alienatione facta, & ex ea Resignatione; alia po-  
 stea fiat, & ex ea etiam Resignatio in favorem  
 alterius, isque primus Investitus fuerit: & post  
 eum prius acquirens: Quaritur uter Potior?*

“**A** Alienatione facta & ex ea Resignatione, si postea alius Emptor vel  
 “aliter acquirens, ex posteriore Resignatione prior investitus fu-  
 “erit, & post eum prior acquirens fuerit etiam investitus ex prior  
 “Resignatione, haud immerito *Quæritur*, Uter potior Jure, & præ-  
 “ferendus sit?

“De ea ratione, apud autores nostros, nihil certi aut expediti Juris re-  
 “peritur: Quibusdam quidem, qui prius investitus est, licet ex posteriore  
 “Resignatione, potior videtur; eâ ratione subnixis, quod ubi jus per va-  
 “rios gradus perficitur, aut ex pluribus partibus integratur, is præferendus  
 “sit, qui per reliquos gradus in summum prior innititur, & ex omnibus par-  
 “tibus Jus integrum & completum nanciscitur; nec enim in Certamine  
 “Equestri qui statim a carceribus perincitatis impetu alios prætervolat, Bra-  
 “beum consequitur, sed qui totum emensus curriculum primus ad metam  
 “decurrit.

“Veriustamen est, & consequens iis quæ superius differuimus, primum  
 “Resignatarium licet posterius factum, Jure potiolem esse; & posterius  
 “acquirentis jus nullum & irritum esse; utpote a non habentibus potes-  
 “tatem profectum. Summus quidem est Diligentia favor, & vigilantibus  
 “jura subveniunt: Ac quod de *Julii Cæsaris* felici & omnia vincente in-  
 “dustria exemplari, proditum est isto versu,



*Nil actum credens, dum quid superesset agendum.*

“ID in jure assequendo, & ubi de eo diligentia certatur locum habet:  
 “Sed in ista specie, tantum abest ut secundus Resignatarius prior jus consummatum adeptus sit, ut nec ullum habeat vel habere potuerit, vel ab alienante vel a domino directo: alienans siquidem dominio utili per alienationem & Resignationem in rem primi acquirentis, penitus exutus, nullum habuit quod in secundum transferret; Juxta illud etiam pueris notum & inter ludentes tritum, *Qui nihil habet, nihil dabit*, & juris prudentie principium & regulam, *Nemo potest transferre in alium plus juris quam ipse habet*.

“Nec magis ex alterutra Resignatione, in favorem vel prioris vel secundi Resignatarii, penes dominum directum jus aliquod erat, quod in secundum transferret; cum enim prima Resignatio in rem & favorem tantum primi acquirentis fuerat, & limitata causa producat tantum limitatum effectum; ex ea Resignatione, nec secundo Resignatario nec alii nisi priori prædium dari potuit: Ex secunda vero Resignatione, cum sit prorsus cassa & inanis facta, scilicet ab alienante prius devestito, & qui nullum jus haberet quod resignaret; ex ea nullum jus erat penes Dominum directum quod transferret in secundum.

“Hinc est quod Resignatione facta, haud dubii Juris est vassallum subfeudum & prædium de se tenendum alii non posse disponere; Cum igitur jus inferius & ut loquuntur *Bassum* dare nequeat, an adhuc penes eum erit Jus & potestas per novam alienationem & Resignationem, prædium alteri concedendi, ut jus majus & nobilius & de domino Superiore tenendum consequatur? Obstante juris regulâ, *Cui non licet quod minus est et quod majus est non licere*.

Cum prædia acquiruntur per Resignationem, eorum dominium non statim & instar Boleri emergit, sed per varios gradus constituitur & elaboratur: il vero sunt, ut proprietarius & qui utile dominium habet alienet, ut deinde vel ipse vel (quod plerumque fit) ejus procurator, jus suum & dominium in manus domini directi resignet; adhibito notario & Instrumento Resignationis in favorem acquirentis confecto; utque Superior prædium non jam Vassalli, sed cujus jus penes ipsum est, disponat Carrâ suâ, addito mandato de Resignatario investiendo, vulgo *Præcepto Sasine*; & demum ex eo, acquirens investitur: per priores istos gradus devestitur alienans, sed in gratiam & in rem acquirentis; per posteriores investitur acquirens, Quemadmodum autem, ubi Scala adeo angusta est, ut per gradus singulis tantum ascensus sit, prioribus gradibus per aliquem vel occupatis vel sublati, in superiores inniti nullus nec speratur nec conatur, Haud secus in feuda acquirendo, ex ista graduum seriè, prioribus, quibus alienans dominio & jure suo nudatus est, sed in primi acquirentis gratiam, per eum occupatis; alteri posterius acquirenti, in ultiores gradus penetrandi, nec spes nec Locus relinquitur: exinde de jure acquirendo & diligentia, frustra certamen esset, prædio per priorem Resignationem Resignatario adeo affecto & addicto, ut alterius esse nequeat.

“Ad hæc cum duplex sit Resignatio prædiorum, vel ad *Remanentiam*, vel in *Favorem*; utriusque quoad Resignantem idem & par est effectus, ut devestiatur scilicet; & quod ejus fuerat dominium utile, ejus esse definat, & penes  
 “Superiorem

“ Superiorem & in ejus manibus collocetur : utroque casu dominium utile  
 “ cum directo e vestigio coalescit & consolidatur ; sed eo discrimine, quod  
 “ ubi Resignatio fit *ad Remanentiam* & in rem ipsius Domini, Consolidatio  
 “ id operatur, ut tam utile quam directum dominium penes Dominum sit,  
 “ sed ut suum nec divellendum ; ubi vero Resignatio fit *in favorem*, do-  
 “ minium utile ita transit, ut interea cum directo conjunctum, penes do-  
 “ minum Superiorem sit ; sed ea lege & modo ut Resignatium investiat :  
 “ nisi enim Dominus esset, & etiam utile haberet dominium, nec id Carta  
 “ sua dare posset : quod & ex ipsa Cartarum ex Resignatione stylo manifest-  
 “ tum est ; nam iis Dominus directus terras disponit, non ut amplius ali-  
 “ enantis, sed quarum Jus ad alienantem pertinerat, & per Resignationem  
 “ translatum & collocatum est in manus suas, sed ligatas ea lege pro novo  
 “ scilicet Infeoffamento acquirenti dando. Ex his sequitur, vasallum per Re-  
 “ signationem sive ea sit ad Remanentiam sive in favorem, pariter deves-  
 “ titum ; & post alterutram, in ejus fraudem, nec honeste nec utiliter ali-  
 “ enare posse.

“ Accedit quod haud pridem in mores nostros irrepfit, & iste apud alias  
 “ Gentes frequentior, ut Investitura detur in usum & rem alterius quam In-  
 “ vestiti : si igitur alienatio fiat domino directo sed in rem & usum alterius,  
 “ & ex ea Resignatio facta sit ad Remanentiam, Isto casu haud ambigen-  
 “ dum, alienantem frustra alienare in fraudem usuarii, in cujus rem & usum  
 “ pradium domino directo alienatum & sursum redditum fuerat. Nec  
 “ magis dubitandum est, & ea Resignatione quæ fit *in favorem*, Alienanti  
 “ ademptam omnem alienandi potestatem ; nam utraque Resignatio fit in  
 “ manus Superioris sed in rem alterius, & ista quæ fit in favorem pariter  
 “ transfert pradium in domini manus, quodammodo ad Remanentiam,  
 “ & apud eum remansurum ; donec ex lege fiducia, quæ in Resignationibus  
 “ contrahitur, Resignatarius investiat.

“ Demum, Resignatio adeo solennis & in rem, & Domini ab alienante  
 “ translativa est, atque in ea tot actus interveniunt tam alienantis qui Re-  
 “ signat, quam Domini directi qui Resignationem admittit, & jus penes se  
 “ translatum Resignatario reddit, tradito symbolo in Fidem & Arrham In-  
 “ vestituræ subsequitur ; intervenientibus etiam Notario & Testibus ; ut  
 “ Resignante mortuo, defunctis etiam tum domino directo tum Resigna-  
 “ tario, Resignatio tamen ejusque vis & effectus haud intercidat & eva-  
 “ nescat ; nam & iis casibus, Investitura a Domini directi successoribus,  
 “ Resignatario aut ejus hæredibus, vel ab eo causam habentibus, dari de-  
 “ bet. Ea Argumenta sunt, Per Resignationem Dominium utile ab Alie-  
 “ nante discedere, ita ut in Superiorem transferatur, & cum Dominio di-  
 “ recto cui interea unitum est, transeat ; nedum ad Domini hæredes, sed  
 “ ad Successores quoslibet singulares. Ex istis omnibus, quæ ut de re &  
 “ quæstione tanti momenti prolixius disceptata sunt, manifestum est alie-  
 “ nanti per Resignationem dissatis, nullam vel juris umbram vel vestigi-  
 “ um superesse ; & Alienationem & ex ea Resignationem si quam posterius  
 “ fecerit, & Investituram etiam priorem eâ, quæ ex priore Resignatione se-  
 “ cuta est, inutilem & nullam esse ; ut a non habentibus potestatem : sal-  
 “ tem annullandam actione Rescissoria, quæ nobis *Reductio* dicitur.

Quæstio

## Quæstio Quinta.

*An is qui in Dominium directum successit Titulo singulari, teneatur Acquirentem in vasallum recipere ex Resignatione in manibus Authoris.*

“**E**X eo quod superius dictum est, Dominium scilicet utile, ex Resignatione in manus Superioris sursum redditum, cum Domino directo, ad successorem in eo etiam singularem transire; ea suboritur *Quæstio*, An Successor singularis teneatur acquirenti, vel ejus heredibus, dominium utile a directo se junctum reddere? & si renuat, quod Juris remedium iis competat? Nulla siquidem inter dominum directum, qui ex Resignatione terras, quoad dominium utile, in manus suas recepit, intercessit necessitudo cum Successore; quia eum representet, ut hæres aut alio titulo universalis; aut ex Fiducia, quæ in Resignatione intervenit, fidem ejus liberare teneatur: Nec magis negotium ei fuit enim Resignatario; vel ullus, quo obligetur, vel contractus, vel quasi contractus.

“Sed præter Personales, sunt aliæ etiam Obligationes in rem, quibus res ipsa subjacet, & qui eam nanciscitur sese subjecit: Sic qui adipiscitur prædium servituti obnoxium; licet ejus dum acquireret nulla mentio aut exceptio fuerit, patientiam tamen, & quæ ex servitute debentur præstare tenetur: Idem de Annuis Reditibus & pactis de Retrovendendo & Retractivis seu Reversionibus & Legè Commissoria dicendum; res enim semper transit cum sua causa & onere; nec alio aut pinguiore Jure Successor utitur, quam eo quod decessor aut Author habuerat: Ea autem est causa domini directi, ut quandocunque Dominium utile per Resignationem cum eo junctum est, qui eam receperit vel ejus Successor etiam singularis, gravatus sit Resignatario & ejus Successoribus Dominium utile restituere.

“Si id facere cunctetur vel renuat Dominus directus, in promptu remedium est, ut scilicet coram Senatu seu Collegio Judicum in Causis Civilibus Supremo, actio summaria intenteretur, & exhibito Instrumento Resignationis, & novissima Carta & Investitura Auctoribus concessa, petatur juxta eam novam fieri Resignatario vel ejus heredi, Sententiâ lata: Si Dominus directus haud pareat, sed adeo contumax sit, ut Rebellis & Exlex denuncietur Banno publico, & Cornu pro Tuba inflato; ut moris est, quod ideo *Cornuatio* apud nos dicitur; Demum jussu & mandato Senatus, Cancellarii Director præceptum Sabinæ dirigeret pro Resignatario, vel ejus herede investiendo, Ita ut de Domino directo teneant, nec vasallus Jure suo fraudetur, nec dominus suo etiam culpa sua decideret; Multandus tamen ob perversitatem & Rebellionem, bonis omnibus mobilibus tam rebus quam nominibus Regi caducis; quod *Eschetam* vocamus.

“Ista sunt intelligenda de prædiis quæ de Subditis tenentur: Rex enim & Quæstores Regii, quique alii ei a Rationibus sunt, id quod justum est haud gravate facere præsumuntur.

Quæstio



## Quæstio Sexta.

*An Superior nedum Resignatarium ejusque hæredes,  
sed Cessionarios investire teneatur?*

“**Q**uæstionem præcedentem de Resignatario ejusque hæredibus recipiendis, excipit ista de *Assignatis*, sic Cessionarii (sed parum Latine) apud nos dicuntur: omnia autem Jura, moribus nostris, cedi possunt, de quibus Investitura haud sequutura vel nec dum secuta est; Si igitur alienatis prædiis, & ex alienatione Resignatione secuta, acquirens ea & jus suum per Alienationem & Resignationem sibi quæsitum, per Cessionem in alium transfulerit, *Quæritur*, An Dominus directus Cessionarium recipere teneatur? Et quidem extra quæstionis aleam, videtur recipiendum esse; Alienatio etenim tam acquirenti quam hæredibus & assignatis ejus facta est; nec minus in eorum favorem Resignatio a Domino Superiore admissa est. Tenendum tamen est Cessionarios recipere Dominum directum haud teneri; Feudum siquidem Beneficium dicitur, & Beneficium nec invito nec ab invito datur & exprimitur; Interque Feudi sive essentialia sive naturalia illud est, ut *Domino inconsulto nedum invito dari nequeant*: Nam Feuda, initio & jure primævo, dabantur a Dominis viris militaribus & sibi devotis, ob Fidem & Virtutem Bellicam, tam ipsorum compertam, quam posterorum præsumptam, juxta illud Poetz, *Fortes creantur fortibus, & bonis, &c.* Licet autem sæculo degeneri, Feuda etiam degeneraverint, ut instar patrimonialium sint, & Feuda in ipsis Feudis desideres; Tamen fere ubique illud retinet, ut pro Vasallo & veteri Clienti, novus & extraneus non possit obrudi; Etiam isto tempore quo bellum, ut ait Ennius, *Magis cauponatur quam belligeratur*, & mercenario milite conducitur & dolo magis quam virtute geritur. In Gallia, & aliis haud multis Regionibus, ubi favore Commerci (qui summus est) concessum est Feuda alienare, id fit eo temperamento; ut pro recognoscendo & laudando Domino, *Compositio*, ut loquimur, & Laudimia Domino directo pendi debeant, certa parte pretii in id decisa, & Legibus definita. Cæterum apud nos, Feuda de Domino tenenda, nisi Dominus consenserit, frustra (interdum haud impune) alienantur; Si militaria sint, & Custodia, & Maritagium hæredis, ad Dominum pertinent: nec adhuc parum refert qualem Dominus sibi asciscat Vasallum. Aliarum enim rerum, juxta Juris Regulam, *Duo non possunt esse Domini in solidum*, in Feudis vero duo sunt Domini & perpetui, sed *Dominio* diverso & dispari; ita ut penes Superiorem, *Directum*; penes Vasallum sit *Utile*; & utrique ex eodem Fundo fructus sint & proventus, *Utiles* quidem *Naturales*, *Directo* vero *Civiles & Obventiones*; Ex ista, ut fere omni communione, plerumque nascitur quæstionum & litium seges, de Warda, Maritagio, Non-introitu & aliis Obventionibus, quæ cedunt Domino directo: ut igitur litibus & rixis obviam eatur, & de dominii sui fructibus mature & officiose (ut par est) satisfiat, si mutandus sit Vasallus Domino directo cavendum est, ne pro viro probo & bonæ indolis, morosum & dyscolum; & pro devoto & cliente, potentiorum & tantum non adversari-

“um nanciscatur. Iis de causis nec injuriâ, Domino ita consultum est, ne invitus Vassallum novum & incommodum habeat.

“Nec obstant quæ superius dicta sunt, Dominum *sciz.* Resignatione in ejus manus factâ in Favorem & in Gratiâ acquirantis & ejus hæredum & assignatorum, eo ipso consentire, ut acquirantis tam hæredes quam assignatos in Vassallum recipiat; verba enim ista tam in Alienationis quam in Resignationis Instrumentis, intelligenda sunt civiliter & secundum subjectam materiam, *sciz.* ut Resignatione factâ Resignatarium & Hæredes ejus investiat (Hæres enim in Jure censetur eadem persona cum defuncto) Cessionarium vero si sibi visum fuerit: Imo si Resignatarius investitus sit Charta ipsi & Hæredibus & Assignatis concessa, Feudo mulctatur, si militare sit, & Vassallum in Feudo vel de se vel Domino tenendo, sine Domini consensu, investiret.

“Cum duæ sint Alienationes, altera Resignatorio, altera Cessionario, una autem Investitura: Si Dominus assignatum ex Cessione investire paratus sit, supervacuum est querere, an unum aut duplex Laudimium Domino solvendum sit; cum Domino integrum & penes eum arbitrium sit vel haud admittre, vel quibus conveniret conditionibus & Laudimium eum recipere; Et si Dominus per compendium, Cessionarium brevi manu recipere velit, Charta & ex ea Salina ei tradita; haud invidenda videntur Domino Laudimia, quæ consequeretur si longiore & operoso circuitu nec modicis sumptibus, Charta & Salina Resignatorio tradita, & Resignatione in gratiam Cessionarii, & ex ea repetita iterum Charta & Salina, assignati Investitura absolvenda esset.

### De Resignationibus a Domino directo acceptatis, An devestiant Resignantes?

“Supposito in facti specie, Vassallum Feudi militaris illud vendidisse; & Resignatione factâ per procuratorem ex Mandato, inter alias clausulas solennes in literis seu Instrumento venditionis inserto, & per Dominum directum seu Superiorem recepta, coram notario & testibus, ut moris est, & de ea Instrumento confecto; sed postea diem obiisse relicto Hærede impubere, Emptore nondum investito, *Quæritur*, An Custodia & Maritagium Hæredis venditoris, Domino directo obveniant & debeantur? Haud inficias eo utriusque partis Patronis haud deesse argumenta; nec ea quidem levia: sed omnibus ultro citroque perpensis, *Negativa* verior, et Juri et Equitati magis videatur esse consentanea: Eo tamen temperamento et cautela, si omnia bona fide acta sint, et dolus absit, et omnis machinatio fraudulenta; venditore forte in extremis et morbo sonico laborante, et venditione properata, ut frans et factis fiat Domino inficio, et commento isto fraudato istis et aliis Domini sui fructibus, morte Vassalli imminente, propediem obventuris; Si forte venditore et Emptore amicis et colludentibus, et Domino (ut fere Magnates sunt) haud satis attento, consulto differtur & sustinetur Investitura, ejusque petitio, ut ancipiti dolo frustretur Dominus, Causantibus, si præmoriatur venditor, eum penitus devestitum; si Emptor, eum nondum investitum nec Vassallum fuisse.

“Ubi igitur prædium venditum, & Resignatio in Domini volentis & acceptantis

“ ceptantis manum facta est, nec ulla fraus, aut fraudis suspicio subest, ven-  
 “ ditor Dominio utili exutus & penitus devestitus est, adeo ut ad eum de-  
 “ vestiendum, omnia ab eo acta sint; ita ut nihil supersit agendum: Nec ul-  
 “ lum penes eum sit Jus vel Juris umbra; nisi pacto inter eum & Domi-  
 “ num convenerit, ut a Resignatione recedatur; quod plerumque fit, cum  
 “ supervenit alius Emptor, & Resignatione facta in ejus gratiam, novo  
 “ Emptori gratificatur Dominus, Charta & Investitura ei concessa; quod  
 “ plerumque sed parum honeste fit, non obstante priore venditione & Re-  
 “ signatione: quo casu posterior Emptor sed primo Investitus, & Jus ple-  
 “ num & perfectum consecutus, praefertur priori Emptori etiam investito  
 “ sed posterius: Prior enim tempore, quoad Jus completum, potior est  
 “ Jure.

“ Cum igitur venditor quoad Dominum & Emptorem sit devestitus, et  
 “ quoad seipsum *active*, nec enim, ita devestitus praedio divendito, ex eo ali-  
 “ quid commodi aut emolumenti potest consequi, aut ulterius aliquid agere  
 “ ut devestiatur; Sequitur eum deesse esse Vassallum, et devestitum esse *pas-*  
 “ *sive* ut ita loquar: Nec ex praedio, quod amplius haud est suum, aliquid  
 “ incommodi aut periculi, ipsi aut heredibus metuendum; juxta regulam,  
 “ *Penes quem Commoda, penes eundem Incommoda.* Et e contra.

“ 2. *Argum.* Secundo, Si venditoris filius Investituram petat, et, Do-  
 “ mino (ut par est) renuente, Breve impetrarit e Cancellaria, et coram In-  
 “ quisitoribus patrem obuisse ultimo vestitum et salutum, et se ei Heredem  
 “ esse in eo praedio asserat, Et sententia seu veredicto quindecim-virali de-  
 “ clarari petat; ei obstat exceptio, feudum a patre abdicatum in Domi-  
 “ ni manibus esse, et ejus fidei commissum, ut Emptorem in eo investiat,  
 “ idque facere debere & paratum esse.

“ 3. *Argum.* Tercio, *hoc contra dictum est, uno dato absurdo multa sequun-*  
 “ *tur:* Dato igitur Vassallum venditione & Resignatione haud deve-  
 “ stitum esse; Hydrae instar, multa pullulabunt non tam incommoda quam  
 “ absurda, a Ratione et Aequitate aliena. Si enim representato pretio et Feu-  
 “ do abdicato, et omnibus peractis quae facere debuerat aut poterat venditor,  
 “ ut Jus suum in Emptorem transferret, Vassallus adhuc est; tunc ex ejus aut  
 “ Heredis delictis feudalibus et Criminibus si Majestatis sint, Domino Regi;  
 “ sin etiam sint in Dominum immediatum, Domino ipsi feudum ipsum  
 “ committetur, aut feudi ususfructus: Si Venditor, aut ejus Hares, Exlex, &  
 “ per Annum & Diem rebellis fuerit; Si venditor Resignatione facta sta-  
 “ tum morte praereptus sit, antequam Emptor investitus sit, sed pretio pra-  
 “ cepto, aut cum Emptori debitor fuerat, fundo in solutum vendito, nec  
 “ ulla vel venditoris vel Emptoris aut Domini culpa vel mora intervenie-  
 “ rit; Creditores tamen venditoris praedium, per licitationem aut Adjudi-  
 “ cationem sibi addictum & in solutionem datum consequentur Emptore &  
 “ Creditoribus ejus (si qui sunt) frustra quarentibus sibi legum praetextu  
 “ delusis, tam pretio quam praedio carendum; eo colore quod praedium  
 “ tum venditum, tum a venditore resignatum, adhuc tamen penes eum &  
 “ ejus ossibus haerit, ejusque Creditoribus & eorum diligentiae obnoxium.

“ 4. *Argum.* Si, mortuo venditore, Emptor a Domino directo petat  
 “ Investituram feudi, per Resignationem in Domini manibus existentis,  
 “ sed in favorem & rem Emptoris, & quasi Domini fidei commissi, ut eum  
 “ investiat; & de Resignatione constet, cum Dominus Instrumento sub-  
 “ scripserit, aut juramento delato confessus vel habitus sit pro confesso, Re-  
 “ signationem



“signationem factam & admissam, Dominum ut Vasallum investiat cogi  
 “posse, explorati Juris est: Emptore autem investito, qua fronte vendica-  
 “bit Dominus Custodiam prædii & filii venditoris, ejusque Maritagium,  
 “Non-introitum, aut alias obventiones ex obitu venditoris, cum Vasallum  
 “habeat Emptorem, & ei investituram dederit prædii ut optimi maximi,  
 “& quale ad venditorem pertinebat tempore Resignationis. Adhæc, Jura  
 “istâ Wardæ, Relevii, Maritagii, & alia ejusmodi, ideo introducta sunt,  
 “ut Vasalli hærede minore & per ætatem officio & servitiis militaribus im-  
 “pari; Dominus feudum ob servitia concessum, ea causa cessante, ad tempus  
 “quasi condiceret & rehabetet, donec hæres ad Legitimam ætatem perve-  
 “nerit: & cum uxores apud viros sæpe uxorios plurimum possent, Do-  
 “mini multum interest, ex qua familia uxorem ducat, ne forte Domino  
 “iniquior aut inimica sit: Ex autem rationes cessant Emptore investito,  
 “viro ad servitia militaria parato & idoneo: nec refert quam uxorem du-  
 “cat filius venditoris, qui nec est, nec futurus est Domini Vasallus.

“Omiffis aliis quæ pro istâ sententia cumulari possent argumentis: quæ  
 “pro adversa sunt (quam possum paucis) perstringam & diluam. Pri-  
 “mum & in Jure fere unicum est; si venditor adhuc Vasallus nec deve-  
 “stitus est, ex ejus morte Custodiam, si infra ætatem Legitimam est, & ejus  
 “Maritagium ad Dominum pertinere, consequens est: antecedens au-  
 “tem verum esse, & venditorem haud esse dissasitum ita arguitur; penes  
 “devestitum nullum residet Jus vel Juris vestigium, quod alienare, aut in  
 “alium transferre queat; nemo siquidem plus Juris in alium transferre  
 “potest, quam ipse habet; venditorem vero, venditione celebrata & Re-  
 “signatione secuta, non solum de facto alienare, sed in secundum Empto-  
 “rem, Jus etiam nec inutile aut inane transferre posse, ex eo liquet; Quod  
 “secundus Emptor (ut superius attigimus) ex Resignatione in ejus gra-  
 “tiam, licet posteriore, prior tamen investitus, potior erit primo etiam  
 “investito, sed posterius: Et ab eo si possideat, prædium vendicabit &  
 “evincet.

“Accedit *Cragii* nostri, Juris communis & Patrii consultissimi, seu  
 “opinio seu Autoritas; ubi enim quæstionem istam (& satis prolixè) di-  
 “sceptavit; in eam sententiam non tantum propendere, sed pedibus iisse  
 “videtur, Vasallum, Resignatione tam ab eo facta quam a Domino accepta-  
 “ta, haud devestiti.

“Adhæc, quemadmodum Natura, materiam formâ quæ inerat,  
 “nunquam privat aut exuit, nisi nova accedat; haud secus, Jura nulli Jus  
 “adimunt nisi alteri quæzatur.

“Sed *Responsio* in promptu est; primo enim, illud quod supponitur pro  
 “fundamento, *Viz. Secundum Emptorem primo investitum, priori posterius*  
 “*investito potiorum esse*, haud indubitatum aut extra quæstionis aleam est.  
 “Et *Cragius* nullibi quam in ista disceptatione magis perplexus aut minus  
 “sibi constans: Patetur tamen, de eo fundamento moribus nostris variatum:  
 “Et *Cragio*, *David Megilleus Regius Advocatus*, vir laudatissimus, ab eo ibi  
 “& alibi cum maximi honoris præfatione laudatus, opponitur: & ejus non  
 “tantum sententia, sed Senatus-consultum & autoritas rei judicatz, cujus  
 “ibi mentio fit; qua, *Megilleo* patrocinate; secundi Emptoris Investitu-  
 “ram licet priorem, primo Emptore agente actione Rescissoria, nullam &  
 “irritam esse Judicatum est; quia Alienatio facta fuerat a venditore devesti-  
 “to & non habente potestatem.

"H<sup>o</sup>aus etiam Juris nostri peritissimus; sed (ut plerisque videbatur)  
 "nimis & captiosa subtilitatis; atomum & punctum distinguere videtur:  
 "Ait enim, si Vassallus ex Alienatione & Resignatione deestitutus, dederit sub-  
 "feudum de se tenendum, id irritum fore, utpote concessum a non habente  
 "potestatem; sin autem dederit feudum de Domino tenendum, &  
 "Dominus secundum Emptorem primo investierit, Alienationem & Investi-  
 "turam valere; & investitum priori Emptori præferendum. Quomodo autem  
 "penes venditorem Jus & potestas sit dandi Jus nobilius, & feudum de Do-  
 "mino tenendum; eidem autem desit potestas dandi Jus inferius & feu-  
 "dum de se tenendum, intellectu nedum explicatu difficile est; Et Oedi-  
 "po eger. Sed dato nunc moribus nostris in favorem diligentia, secundo  
 "Emptori, qui prædium bona fide comparavit & sibi vigilavit, Jura  
 "subvenire; & diligentia prævertentem, & Jus consummatum ade-  
 "ptum, priori Emptori præferendum; non sequetur tamen venditorem  
 "quoad Dominum adhuc Vassallum esse, nec deestitutum quoad alios effe-  
 "ctus, & eos præsertim, ut Dominus, venditore vivo aut mortuo, ex ejus  
 "persona aut morte nihil commodi aut obventionis petere aut consequi pos-  
 "set; cum feudum non tantum alienarit, sed a sese penitus abdicarit,  
 "Domino consentiente, & feudum, per bacilli traditionem, solennis in  
 "Resignationibus symboli, recipiente; sed ut Emptori traderet; & Do-  
 "minus confestim & unico contextu, per dicti symboli traditionem, Em-  
 "ptori feudum reddere & Investituram concedere, si superstes sit; sin fato  
 "functus, ejus hæredi, Juris remediis compelli possit.

"2<sup>um</sup>. Argumentum est, ab Incommodis, iisque haud paucis quæ con-  
 "trariæ sententiæ assertores urgent. 1<sup>mo</sup>. exaggerant; eotemporis interstitio  
 "inter Resignationem venditoris & Emptoris, Investituram (quod, Em-  
 "ptore negligente aut moriente, incertum dictu, quam diuturnum futu-  
 "rum sit) Dominium directum interea sterile & effectum fore; feudi Cu-  
 "stodiam, Maritagium, & alios Domini istius fructus & emolumenta, si  
 "ex persona venditoris haud obveniant, quia vassallus esse desit; ex perso-  
 "na Emptoris haud speranda; nec enim unquam fuit, nec certum est an  
 "futurus sit Vassallus; siquidem multa cadunt inter calicem supremaque  
 "labra: Porro, cum nec Alienationis instrumentum nec Resignationis pe-  
 "nes Dominum sit, sed illud penes Emptorem, istud penes Tabelliones,  
 "homines isto seculolubricæ & suspectæ fidei; in suspenso & incertum fo-  
 "re, utrum Dominus sit venditori an Emptori; & colludentibus facile esse  
 "utrum velint, & prout e re sua et sibi commodum fuerit, Domino  
 "Vassallum obtrudere, celatis Instrumentis aut deletis.

"Ad istud Argumentum, haud respondebo, quod vulgo dicitur, Incom-  
 "modum non solvere Argumentum nedum Jus: sed ostendam, casu sup-  
 "posito, quæ supra memorata sunt, non sequi incommoda: nec enim ve-  
 "rum est Dominium directum interea inutile & infecundum fore; nam  
 "Alienatione & Resignatione facta, quæ non tam Jus est quam via ad Jus,  
 "licet Emptor Jus in Re & Completum ante investituram haud nancisca-  
 "tur; ex Alienatione tamen Jus habet ad Rem; & ex Resignatione rece-  
 "pta a Domino directo Jus in Re inchoatum; sed adeo efficax, tam quoad  
 "Dominum quam Resignatarium, ut si venditor dolo malo alii vendiderit,  
 "& Dominus directus dolo affinis fuerit, secundum Emptorem investiendo,  
 "neutri impune sit; sed Actio detur primo Emptori contra venditorem &  
 "Empto: Et si inops sit, & contra eum actio inanis futura; datur adver-  
 "sus

"sus Dominum ex *Stellionatu & dolo*, pro damno & interesse: Imo  
 "cum Resignatarius recipiendæ investituræ in spe proxima sit,  
 "& spes radicata in Jure multum operetur, si nulla Domini mora aut  
 "cunctatio sit, habetur pro investito, quoad Domini commoda &  
 "obventiones: quando enim stat per eum, cujus interest, aliquid fieri ne  
 "id fiat, habetur pro facto & impleto: Si igitur Resignatarius moras  
 "nectet nec Investituram petat, Terræ erunt in Non-introitu, Et eo du-  
 "rante Dominus fructus consequetur; Et si moriatur, Custodia & Mari-  
 "tagium hæredis, & ex hæredis rebellionem ususfructus, si per annum in ea  
 "perstiterit, & aliæ id genus obventiones, ad Dominum directum perti-  
 "nebunt: haud secus quam si defunctus fuisset investitus. Et quemad-  
 "modum mortuo Vassallo, ejus hæres etiam si hæreditatem non adierit, imò  
 "repudiarit, pro investito habetur, eatenus ut Domini fructus & emo-  
 "lumenta obveniant, v. g. Non-introitus, Maritagium, & ex delictis  
 "Eschetæ, seu caduca, & privatio vel feudi vel ususfructus; nec enim ejus  
 "mora aut culpa non petendo Investituram Domino obesse debet: Non  
 "absimili ratione, Resignatarius, ubi de Domini commodo agitur, pro Va-  
 "sallo censetur; si per eum stet quo minus sit Vassallus. Quod de Incerti-  
 "tudine objicitur, facile diluitur; si enim Terræ non tenentur de Domino  
 "Rege sed de alio Domino, sibi Dominus cavere debet & suo periculo si  
 "secus faxit, sibi que imputatur; nec fere evenit aut contingere potest, ut Do-  
 "minus aliquid detrimenti capiat; Vassallus enim Domino invito haud  
 "obtruditur; & ante Resignationem cum Domino transigitur de Laudii-  
 "miis, & si quæ alia ab Emptore præstanda sunt Domino, ut ab omni pericu-  
 "lo & incommodo securus sit. Non diffiteor longe aliam rationem esse Do-  
 "mini Regis; Cum enim Pater Patriæ sit, nec sit e dignitate sua causari  
 "aliquem e subditis sibi iniquum aut insensum; nullo delectu aut discrimi-  
 "ne Resignationes recipit, per eos quibus eam Provinciam demandavit.  
 "Adhæc, Principes de rebus publicis solliciti, privatis superesse nequeunt;  
 "& viris clarissimis, qui a Rationibus sunt (utcumque impigris & sedulis)  
 "haud mirum est si aliquando imponatur; sed fraus deprehensa punitur:  
 "& lege consultissima statutum, Regis Ministrorum Incuriam & Negli-  
 "gentiam Regi haud officere: nec difficile adhibere remedia quibus fraudi-  
 "bus & incommodis obviam eatur, & inter alia illud esset haud spernendum,  
 "si Resignatione facta Instrumentum Resignationis statim conficeretur,  
 "subscribentibus etiam tam Resignante quam Resignatario, & apud Ca-  
 "meram Rationum deponatur; alioqui Resignatio habeatur pro infecta;  
 "sic enim constabit Resignationem celebratam, & incommoda supra-  
 "dicta cessabunt. Interea, quæ pro Negativa disseruimus, intelligi velim,  
 "si compertum sit Resignationem factam, nec fraudem subesse, eo casu;  
 "quia omne Jus a Rege ut Juris fonte profluit; & si scriptum sit, sanxit;  
 "si moribus introductum permisit, & quasi tacito consensu firmavit; quod  
 "in alios statuerit Jure uti debet.

"Cum Deus nobis hæc omnia fecerit aut fieri permiserit, statueram ea ut-  
 "cumque oblectare id genus exercitationibus; & comperto quæstionem in  
 "foro ventilari, videbar mihi operæ præmium facturus, si, in casu arduo,  
 "exitus dubii & ancipitis, & quicumque demum futurus sit magni momen-  
 "ti, quid Juris sit dispicerem; & quid meæ esset opinionis dicerem; id  
 "feci eo animi candore; ut nec in Regem studio, quod mihi semper ma-  
 "ximum fuerat, nec alio affectu transversum rapi, mihi permiserim; li-  
 "cet



“cet in causa simili etiam res mea ageretur, nec focero nec vitrico nec aliis ultimus hæres fui; nec assentione aut aliis artibus ab aliquo opes e-  
 “blanditus aut adeptus sum nec munus: antequam enim ad munera, eodem quo nunc mihi ereptum est impetu, & ab iisdem raptus sum tantum  
 “non invitatus, & eorum quæ mihi acciderunt præfagus: Deo largiente, &  
 “industriæ Laboriosæ & innoxie, & alienis haud inhianti, favente, fui &  
 “adhuc sum Superior & Dominus directus haud unius Vassalli: sed cum  
 “ista animo agitare, immo peroripissem, haud animo præjudicandi ne-  
 “dum fugillandi amplissimi Senatus sententiam, incertus quænam futura  
 “esset; sed ne animus negotiis assuetus, immo ab ineunte ætate innutritus,  
 “nunc ignobili otio & desidiosa torpesceret: tandem mihi nunciatum est Se-  
 “natum pro *Affirmativa* judicasse, secundum actorem Regis Donatarium.

### Retention.

**Q**UÆRITUR, In the Cases of Compensation (mentioned in the Questions second and third anent Compensation in the Letter C.) If at least the Defender may pretend, that he should not be in worse case, than if the Assignment were not made; and therefore ought to have Retention until his Debt be liquidate? *It is Answered*, That there is no ground for Retention, but the Defender ought to have done Diligence to affect the Debt due to him; which he might have done by Inhibition upon the Dependence, or by assigning his Action, to the effect Arrestment might have been made in his hands of the Debt due by him.

*Cum refundere oportet impensas & meliorationes, Jus Retentionis competit; quia interest magis per Exceptionem retinere, quam per actionem repetere. Jus Fluviat. p. 779. n. 78.*

### Retours.

**I**F the Sheriff-Clerk, and Sheriff of the Shire, to which the Lands are unite, may not give Seafin, and will be lyable to answer in *capiendo Securitatem*, for what is contained in the Retour, as to both Lands?

### Retoured Duty.

**A**N Annualrent of One Hundred Pound Sterling being given out of a Barony, for a Sum of Money lent to the Baron upon that Surety, to be holden of the Superior, *Quæritur* If the Barony, being of a considerable Rent, suppose Nine Thousand Merks per annum; and the new extent of the hails Barony being but Twenty Pounds, if the Annualrent should be in Non-entry, whether the Non-entry should be the full Annualrent, upon that pretence that *valet seipsum*? Or if it should be only a proportion of the retoured Duty, viz. *The fifth part*? *Answer*. It is thought, that it should be only a proportion of the retoured Duty; And *valet seipsum* is only understood, when there is no other retoured Duty; And in this case, it appears there is no other retoured Duty, In so far as the whole Barony and Rent being retoured, the Annualrent being the *fifth part*

*part* is consequently retoured: And it were absurd, that for the Non-entry of an Annualrent, there should be more due than for the whole Barony; Specially seing the Superior wants not a Vassal of the Barony to serve him for the whole Barony; and the Annualrenter is not properly a Vassal obliged to serve, being infest only for surety of his Money.

### Return of Lands to the Superior, upon a Provision.

**I**F there should be any Difference betwixt *Ultimus Hares*, and the King succeeding upon a Provision of Return, Failzieing Heirs male? *Ratio Dubitandi*, An *ultimus Hares* and the Donatar is lyable to Debts; but in the other Case, it is doubtful: Because it is a Maxim, that when ever Lands are returned to the Superior, either *ad Remanentiam*, or *ad Tempus*, as in the Case of Forefaulture, or Recognition, or Ward, or Non-entry, they return *pura & ut profecta sunt*: and specially in Ward-lands, and where it appears that the Superior *elegit familiam*, and has given Lands with an exprefs Provision of Return; it may seem reasonable, that seing he has none to serve him in the Family, he may have the Lands back in the same condition he did give them.

### Return of Lands to the King, failzieing of Heirs Male.

**T**HE King having disposed Lands without an Onerous Cause to a Relation or Servant, and his Heirs male; which Failzieing to return, if the Masculine Line fail, *Quaritur*, Will the King have Right without the Burden of Debts? *2do*. If the Lands be comprised, (although the King should be free of Personal Debts) Will the Compriseing, though expired be void; *Quia resolutio Jure dantis, resolvitur Jus accipientis*?

### Reversion.

**A** Reversion being granted, failzieing Heirs of the Granters Body; may the Granter dispone as absolute Fiar? Will his Wife have a Life-rent by the Contract of Marriage? Will she have a Terce? So that the Effect of Reversion will be only against his other Heirs than those of his Body, if the Lands be not disposed or burdened by the Fiar? *Lamberton contra the Relict of Plenderquest*.

What is the Import of that Clause in Wadsets subjoined to Reversions, That it should not be lawful to redeem, but by payment not only of the Sum given upon the Wadset, but of all other Sums due by the Granter his Heirs and Successors to the Receiver and his forefairs; if it be effectual not only against the Heirs, and those who represent the Granter, but against singular Successors? *Rationes Dubitandi*, *1mo*. The said Clause is neither a Reversion nor Eik to a Reversion, which ought to be special, and

and contain certain Sums, or liquid Obligments. 2<sup>do</sup>. Destructive of Commerce, seeing it cannot be constant, whether the Person having Right to the Reversion, be such as may be dealt with; seeing it doth not appear by the Register, whether he be owing to the Creditor any other Sums by that upon the Wadset. 3<sup>io</sup>. If the Reversion should go *per mille manus*, Will Sums due by all these who had Right thereto to the Haver of the Wadset or his forefairs, be real; So as to affect the Reversion. 4<sup>to</sup>. may the Creditor take voluntar Assignations to debts due by his Debitor, and so prefer such of the Creditors as he pleaseth, and burden the Reversion, so that the Debitor cannot redeem. 5<sup>to</sup>. If other Creditors compryse from the Debitor, before the haver of the wadset be creditor in other Sums to the Granter, will he be prejudged by the Comprysing as *medium impedimentum*?

What is the Import of an Eik to Reversion? If the Creditor will have a real interest to affect the Duties, as if it were an Eik to the Back-tack? *Ratio Dubitandi*, The said Sum is due upon the Wadset, and *eo ipso* that it is eiked to the Reversion, it is eiked to the Tack; and *plus valet quod agitur*, &c. And on the other part, Reversions are *stricti Juris*, and import no more than *quod sonant*, viz. That it should not be lawful to Redeem, but upon payment of the Sum contained in the Eik.

Premonition being used (upon a Reversion) to the Wadsetter for receiving his Money, *Quaritur*, If there be *Locus Penitentiae*, so that it may be past from? *Ratio Dubitandi*, *Licet Renunciare Juri pro se introducto*. On the other Part, it may be pretended, That *Jus* is *quisitum* to the Wadsetter; so that if it be his interest to have his Money, he may upon the Premonition call for it. The Question will be greater, if there be an Infestment of Annualrent with a Reversion to the Granter, without an Obligement to pay the Principal Sum upon Requisition; seeing the Person who has Right to the Annualrent, may be concerned to have the Principal Sum; which he cannot have, if the Heretor do pass from his Premonition.

If a Comprysing of Lands disposed to the Wife, will Import *Jus revocandi* competent to the Husband, so that the Deed in favours of the Wife cannot be said *morite confirmari*, in respect of the said *medium impedimentum*? Item, Whether at least the Wife will have Right to the Legal?

### Reversions of Comprysings against appearand Heirs.

**I**F Comprysings or Adjudications against Appearand Heirs do not expire before they be twenty five Years? *Ratio Dubitandi*, That the Act of Parliament is in favours of Minors having Right, and the Appearand Heir has no Right: and in Adjudications they renounce to be Heir: and there is no Reason that the Creditor should be prejudged, upon Preference of favour to a Person who has no Right.

If the Appearand Heir be reponed before he be twenty five Years, the Creditor who would adjudge the Reversion competent to him, will consequently be restored?



### Reversion Personal.

*Quæritur*, If a Reversion that is Personal. (excluding Heirs and Assignees) may be comprised? *Ratio Dubitandi*, A Compriser is upon the matter, and in construction of Law a Legal Assigney: And on the contrary, Voluntary Assignations are only excluded, but not Comprising: And there is not *par ratio*, because it is in *arbitrio* of the Person who has Right of Reversion personal to himself, either to Redeem, or not: but a Debitor having Right to a Reversion, ought to satisfy his Debt: And if he will not make use of his Right of Reversion to that purpose, The Law gives a Remedy by Comprising.

If the Compriser of such a Reversion may redeem after the Death of the Person to whom it granted? *Ratio Dubitandi*, The Heretor whose Lands are affected with the Reversion, ought not to be in worse Case, at least as to the Time and Endurance of the reversion: and the Compriser *sibi imputet*, That he does not make use of his Right in time: and he has advantage enough in Law, that the Reversion being Personal may be Comprised.

If a Reversion, that is Personal, Doth fall under Forefaulture? *Ratio Dubitandi*, That the Fisk is not so favourable as the Creditor and Compriser: And yet it is to be considered, that whatever is competent to the Traitor doth forefault to the Fisk: And otherways, it would be an Encouragement to commit Treason, if such Reversions and Faculties being only competent to Parents and Relations, they cannot forefault; so that their Children may briuk the Estate, notwithstanding of their Treason.

When a Person has right to Redeem personally to himself, after the using of the Order he may assign; But *Quæritur*, If having proceeded to his Order by premonition, he decease before completing of the same, in that case he may assign, and the Assigney may prosecute the Order? *Ratio Dubitandi*, He has declared his Will to redeem: And yet on the other part, *Actus inceptus non habetur pro completo: sed Cogitandum*.

*Quid Juris*, In such a Case, In *Retractu Gentilitio*? And if in any Case, in *actibus arbitrariis facultatis*, *aliqualis Declaratio arbitrii*, be sufficient?

A Reversion being to a Person; and the Heirs male of his Body altogether, excluding Assignees and other Heirs; *Quæritur* if it falls under the Forefaulture of the person to whom the Reversion is granted as said is? *Ratio Dubitandi*, That all others are excluded, both Heirs of Line and Assignees: And on the other part, the Reversion is not merely personal, but *Jus Hereditarium transmissibile* to the Heirs foresaid of his Body? *Cogitandum*.

*Quæ Ratio*, That a Reversion granted to a person only, and not to Heirs and Assignees; or a power to dispose reserved in the Right granted with the same, may be comprised, and yet does not fall under Forefaulture? *Answer*, Nothing falls under Forefaulture that is personal only, and which is neither *cessibile* nor *transmissibile ad hæredes*. Whereas a Reversion that is merely Personal, though it cannot be conveyed by a voluntary Right and Assignation, may be comprised: Seing by the Comprising

sing, the Person who has the Reversion his debt is satisfied; and he ought to have made use of the said Faculty and Right to that Purpose: And seeing he is *in dolo*, that he does not make use of it, the Law doth justly provide that it may be comprised, and used to that end; which both in Law and Conscience he should have used for himself: *Et interest Reipublicæ ut quis re sua bene utatur.*

### Legal Reversion competent to Idiots, &c.

**Q**UÆRITUR, If a Fatuous Person or Idiot, having Right to a Legal Reversion has the Benefit competent to a Minor, to redeem after his recovery? *Answer*, It is thought, not: seeing by our Law and Custom, Minors before the Act of Parliament 1621. had not that benefit: And by the said Act of Parliament, it is given only to Minors, *Et Exceptio firmat Regulam, &c.* And neither can Statutes be extended, nor is there *eadem Ratio*, seeing the time of Minority is defined; Whereas a Fatuous Person may live a very long time; and it is hard that the Creditor should be *in incerto* all that time, as to his Right and Dominion, whether it be simple or redeemable. *Earl of Kincardin.*

If Actions upon Contracts do prescribe against Fatuous Persons? *Answer*, They do not prescribe; *quia non valent agere*: and there is a Difference betwixt Prescription of Actions, and of Legal and other limited Reversions, which are only given for a certain time: Because *Jus Limitatum*, to a certain time *producit limitatum effectum, viz.* A limited Action during the said time: And it being just, and the Compriser or Heretors Interest, That the Reversion should be only limited, and for the said time, *ne Dominium sit in incerto*, as said is, he cannot be in worse case by Reason of the condition of the Party who has Right to the Reversion, being Minor or Fatuous: and in effect by a Reversion, the Compriser or Heretors Right, is *Jus resolvable sub conditione potestativa*; and in such cases it cannot be pretended, that the party could not satisfy the condition, being Minor & Fatuous.

### Rights made by Dyvours,

**Q**UÆRITUR, Whereas by the Act of Parliament anent Dyvours, Rights granted without an Onerous Cause, in prejudice of Creditors, are reducible; without Prejudice always of those who have acquired Rights from the Confident Person *bona fide*: If the said *Salvo* should be extended to Comprisers? *Ratio Dubitandi*, That it appears hard that Creditors should be prejudged, and be in worse case by the Fraud of their Debitor, and their action (being competent to them and *nata* immediately after the fraudulent Alienation) should be taken away from them without their own Deed: and yet the said *Salvo* being only in favours of Purchasers, and *favore Commertii*, and of these who *bona fide* contract with Persons that are not inhibited, neither they nor their Authors should be excluded; and Comprisers cannot plead the favour of Commerce, seeing they have not any Commerce nor Contract with a Confident Person, but against their will use Execution against what they conceive doth belong

to him, which they do upon their own hazard, and therefore ought not to be in better case than their Debitor, and cannot have his Right but as he had it, *Et cum sua causa.*

### *Fraudulent Rights in prejudice of Creditors.*

A Debitor after expired Appryfings, Dispones his Estate so incumbered, by a Contract bearing an obligation that the Disposer should cause the Comprisers Dispose their Right: or that it should be lawful to the Buyer to acquire them: And after all should be purged, the Buyer being obliged to pay the Sum thereinmentioned, and accordingly having payed the same to the Seller, *Queritur*, If such a Transaction, though it cannot be questioned upon that head that it is without a just price, yet may be questioned upon the Act of Parliament, as being without a necessary cause; and of purpose to defraud Creditors, who had not preferable Rights?

If a Person be in that condition, that his Debt will exceed the value of his Estate; and because his condition is not known, and being a person of Credit he is not inhibited; any confident friend knowing his condition, if he should acquire a Right to his Estate in hail or in part, for a price equivalent, of purpose that he may have a Livelyhood, *Queritur*, if such a Right may be quarellled as fraudulent? *Ratio Dubitandi*, That it is for an Onerous cause: And on the other part, The Cause was not just nor necessary: and it is presumed that the said course was taken in defraud of the Creditors.

### *Right a non habente potestatem.*

THE King having Disposed Lands, having fallen in his hands by Forefaulture; and the Infeftment being past under the Great Seal; the person to whom it was granted did de cease before Seafin; and thereafter another Donator procured a Right under the Great Seal; and was Infeft thereupon, *Queritur*, If the second Gift may be questioned as being a non habente potestatem; in respect the King was fully denuded in favours of the first Donator, and nothing could be done more to denude him by himself: and the taking of Seafin is not the Act of the King, but of the Party: And it could not be imputed to the Donator, that he did not take Seafin, being surprised by Death: And double Rights are forbidden by the Law?

### *Rights ad Tractum futuri Temporis.*

WHEN a Tack or Annuity for certain years, belongs to a person; It does not belong to his Executors; because it has *Tractum futuri Temporis*; But if he have Right to it by the Bicheat of another person, it will belong to his Executors. To consider what is the reason of the difference.



*Right in Trust.*

**H**IS Majesty having upon the Forefaulture of the *Earl of Argyle* given a part of the Estate to My Lord *Lorn* with the Title of Earl; beside what he was Infeft in before: And having given of Provision for the rest of the Children alse many Lands as would extend to the Rents allotted to them: and having given out of the Estate a Liferent to the Lady *Argyle*; and the rest of the Estate to the Creditors: and having appointed the *Lords of Session* Commissioners, for hearing the Creditors claims, and determining the same; and upon their competition for preference. There is also a Right of the Estate settled upon Three Trustees to the longest liver of them Three, without mention of Heirs and Assignees, being Three Clerks, one of the Session, one of the Council, and one of the Exchequer, to the uses foresaid; and that the said Estate may be conveyed, and allotted, as His Majesty had Ordered: *Quæritur*, If a Signature to the effect foresaid be *habilis modus*? *Answer*. It is thought, not; Seing there being no mention of Heirs, the said Right granted to the Trustees, if they should all Die, will evanish; albeit it be granted to them in Fee: And therefore it is thought, that the proper way were, That a Commission only should be granted to the Trustees, to Dispose to such persons, as the Commissioners should appoint: And as to Lands holden of the King, Charters should be granted making mention of the Forefaulture, and Commission and Disposition made by vertue thereof, and ratifying the same; and conform thereto giving and Disposing the Lands therein contained.

*Ripa & Ripatica.*

**U**SUS Riparum est publicus, & cuilibet licet naves ad eas appellere; Ripa enim hanc servitutem debent flumini, cujus usus sine usu riparum nullus est: & servitus ista a natura imposita videtur, ut usu fluminis concesso & ea concessa intelligantur sine quibus eo uti non possumus. Jus Fluviatricum p. 28. n. 362.

Ripatica penduntur pro trajectione, quæ navi fit ab una Ripa in aliam: & sunt omnia Emolumenta & redditus quæ Princeps capit in Ripis fluminum, vel cingalia scilicet & potestas cogendi ad muniendas Ripas. Idem p. 30. n. 375.

**Quando Dies cedit in Grass Rouns, when there is Question betwixt Fiars and Liferenters?**

**I**T being the Custom of the Country in some places, That Lands consisting of *Grass-Rouns*, are Yearly set from *Whitesunday* to *Whitesunday* thereafter, for payment of a Silver Duty at *Martinmas* after they are set; *Quæritur* Therefore, If the Fiar survive the *Whitesunday*, but dieth before the *Martinmas*, if he will have any part of the *Martinmas* Duty? Or if it will belong entirely to the Relict, Liferenter, or next Fiar? *Answer*. It is thought, That he nor his Executors would have no part of that Duty, being payed for the said Year, betwixt *Whitesunday* and the next ensuing *Whitesunday*: Seing he deceased (as said is) before *Dies* either cessit, or venit. *Monmouth.*

In some places *Grafs-Roums* are set from *Whitesunday* to *Whitesunday*, but the Term of Payment is *Candlemas*, and *Lambmas*. *Queritur*, If the Fiar decease after *Martinmas* after it is set, but before the first Term of Payment; if he will have any part of that Years Duty? *Answer*. It is thought, he will have the half; and what ever be the Term of Payment, *Dies cedit* at *Martinmas*, for the half Year preceeding.

Seing for the Duty of Corn-lands, though payable betwixt *Tule* and *Candlemas*, yet *Dies cedit* at *Whitesunday* and *Martinmas* as in the Question foresaid; *Queritur*, What is the reason of so great difference betwixt these and *Grafs-Roums*? *Answer*. That the Duty being payed for the Cropt, the Terms of *Whitesunday* and *Martinmas* are respected; so that the Fiar surviving *Whitesunday*, his Executors have Right to the half of the Year; upon that consideration (as appears) because the Lands are then fully laboured, and Sown; and whoever survives *Martinmas* has Right to that Terms Duty, because the Cropt is then fully collected: But as to *Grafs-Roums* set, (as said is) at *Whitesunday* to *Whitesunday* thereafter; the *Grafs* only is to be considered, which upon the matter is the Cropt of these Roums; and the reason why the Duty of the whole Year is payed at *Martinmas*, appears to be, that before *Martinmas* the *Grafs*-profits are collected by selling of their Wool and Beasts, at or before that time.

*Queritur*, If the Fiar decease after *Martinmas* and has not uplifted the Duty, will the same divide betwixt him and the Liferenter? And if he has uplifted the same, if his Executors would be Lyable to refund the half to the Liferenter? *Answer*, *Cogitandum*. For if it be not uplifted it appears reasonable that the Liferenter should have the half, and if it be uplifted, it appears hard that the Fiar having uplifted the same *Jure suo & bona fide*, should be Lyable to render any part of the same; specially seing the Liferenter may have the same advantage if she should decease after *Martinmas*.

If Corn Roums should be set in the same Terms, That the Duty should be payed at *Martinmas* after they are set, *Quid Juris*? Seing the said payment will be before the next Cropt, and the Fiar may die before both the Terms of the next Year, for which the Duty is due? *Answer*. It is thought, that the Fiar cannot set the said Lands in manner foresaid, in prejudice of the Liferenter: And if the Tennent take the same that way, it is upon his own hazard: And the Liferenter would force him to pay the Duty, after the ordinary Terms of the Country.

*Queritur*, If a Tennent have a Liferent-Tack, and he Die after *Whitesunday*, If the Tack will not continue for that Year? Seing the time of Removing of Goods necessary for labouring is past before his decease, and Roums being set from *Whitesunday* to *Whitesunday*, *annus captus*, as to Labouring, *habetur pro completo*. *Vide Annuum Legatum*.

*Queritur*, If there be not the same reason as to Liferenters, in Labouring or possessing the Land with their own Goods, seing their Executors cannot remove the Goods after that time, and the Year of the Liferent is begun?

## S.

*Act Salvo.*

**Q** *Uæritur*, If Ratifications in Parliament, with the Clause, *That they should not be Lyable to the general Salvo*, Will prejudice a third Person having undoubted Right, and having been secured by a general Law, *viz.* The *Act Salvo Jure*: The Ratification being only a private Act, and the persons concerned not being called?

*Seafin.*

**A** Posterior Seafin, but first Registrate, whether will it be preferred to the prior Seafin, Registrate thereafter though *debito tempore*?

*Registration of Seafins.*

**I**F a Seafin of Reversion granted by a Bishop will militate against the Successor, albeit it be not Registrate in the Register of Seafins? *Ratio Dubitandi*, The Bishop doth not succeed as Heir: And yet he cannot be said to be a singular successor, and Bishops they are *Corpora singula*.

*Special Services and Precepts of Clare constat.*

**A** Person being served Heir-male or Provision in special in certain Lands, and deceasing before he be Infeft: *Quæritur*, If his general Heirs will be lyable to the Debt of that person to whom he was served Special Heir?

The same Question may be moved upon a Precept of *Clare constat*, whereupon Infeftment has not followed; being in neither of the said cases there is *Aditio Hereditatis* before Infeftment; whereas in general Services there is *Aditio* as to any Estate, whereupon there is no Infeftment?

*Servitude and Extinguishment thereof.*

**I**F a Person who has Right to a Servitude out of other Lands, should acquire also *Pradium Serviens*; *Quæritur*, If *eo ipso* that he has Right, both to *Pradium Dominans* & *Serviens*, the Servitude doth extinguish; *Quia res sua nemini servit*? and if he should thereafter Dispose *Pradium Serviens*, whether the said Servitude not being reserved; either he or his singular successor in the Right of the other Lands can claim the same? Or if he should Dispose *pradium Dominans* without mention of the Servitude, but with all Liberties and pertinents; whether will that Servitude revive, as being only *Sopita* for the time, while both Lands belonged to one person, but



but not extinct by any Discharge, or deed freeing the Lands of the same?

If a person has constitute by Writ a Servitude, and thereafter Dispose his Lands without excepting of the same. *Queritur*, If it will militate against a singular Successor? *Answer*. Such *Jura Hereditaria* which are *in rem*, *non Transferuntur nudis pactis sed traditione*; and by possession, which is *instar traditionis*: But if the Servitude be *Discontinua* as *v. g.* the leading of Sea-ware, which is not done but at a certain time of the Year, *Queritur*, what shall be done to perfect the Constitution? *It is thought*, it may be published by making Intimation thereof to the Tennents, and at the Paroch Church, and upon the ground: and the Granter, if need be, may be Inhibited.

*Si alicui Jus hauriendi & adeundi concessum est, utrumque habet: Si tantum hauriendi, inest aditus: Si tantum adeundi ad fontem, inest & hausus: aliquo enim concesso, omne illud, sine quo hoc Jure uti nequimus, concessum intelligitur. Jus Fluviat. p. 89. initio.*

*Aut vicini aquam hauserunt, Jure familiaritatis aut Jure adquisito; hoc casu cogi nequeunt, ut in fonte mutationem admittant; illo possunt. Idem. p. 90. n. 40.*

### Lords of Session.

**I**F the Lords of Session have power to Judge *Appellatione remota*, seeing they have the same power, which the Lords of Session had formerly? *It is thought*, that they have the same power *Extensive* as to the subject of their Jurisdiction; but not *Intensive*, as to the quality foresaid, if it be not exprest; being *ex reservatis quæ non transeunt nisi exprimantur*: Seeing *Adæquatio*, by the clause with the same power, is to be understood as to the ordinar power belonging to Judicatories and Incorporations *qua talia*; and not as to any Extraordinary Power and Privilege: As if a Burgh should be Erected with the same privileges belonging to any Burgh within the Kingdom, they will not have Right to be Sheriffs within themselves; by reason other Burghs have that Right, *non qua Burga*; but by a special privilege: And some Lords of Regality do pretend to the Escheats of the Persons within their Regality upon Horning, and yet a Right of Regality by the general clause, will not cary the same.

If the Lords of Session be to be considered as Judges only, or Magistrates, & *Prætores habentes Imperium* in some cases?

### Sheriffs.

**I**F Precepts of Sheriffs may be put in Execution, by their Officers, after their Death?

### Ships.

**I**F a Ship being abroad, *Traditio Instrumentorum* (to a Buyer, *viz.*) of the vendition, be sufficient?

If a Ship be poundable, & *quomodo*?

*Solarium.*

*Solarium est vectigal, quod a superficiario penditur pro Jure Superficie in solo. Jus Fluviat. p. 70. n. 15.*

*Sponsalia.*

**I**F, after a solemn Contract of Marriage, one of the Parties Marry other ways; will that Marriage be lawful, even though after Banns upon the said Contract of Marriage? *Answer.* Contracts of Marriage and *Sponsalia inducunt Jus ad rem*, as in other personal Contracts, and Dispositions anent Lands; but not *in re sine Traditione*; which in Marriage, is only when *sequitur Benedictio in facie Ecclesie*, or *Consobitus*.

If *Sponsalia* be consummate and purified *per Copulam*, and a pursuit being intended for Solemnizing the Marriage, and Declaring the Issue lawful, the Defender die in the *interim*; may the pursuit be transferred in favours of the Wife and Children, *ad hunc effectum* at least, that she may have *Jus Relictæ*, and they be Heirs and Executors to their Father? *Eadem est questio*, as to promise and *copula*.

“Rejecta distinctione Canonistarum in *Sponsalia de præsentis & de futuro*, prout illi ista accipiunt: quælibet *Sponsalia*, quibuscunque verbis contracta, nihil aliud sunt quam Conventiones de Matrimonio in futurum contrahendo. *Christenius de Jure Matrimonii. Dissert. 1. §. 3.*

“A modo tamen contrahendi, usu hodierno dividi possunt *Sponsalia*, in pura sine adjectione alicujus conditionis, & Conditionalia quæ honesta conditione apposita contrahuntur, ut ducam si Pater consenserit; illa de præsentis; ista de futuro haud male appellantur. *Ibidem.*

“Qui *Sponsalia* contrahunt, nuptias celebrare compelluntur, legitimis coercionibus: & Contractus *Sponsalitiis*, trinundino promulgatur in Ecclesia, aut pro Curia. *Ibidem sent. 6.*

“Concubitu purificantur *Sponsalia* sub conditione, & statim fit conjugium; quia censentur sponsi a conditione recedere: nec obest protestatio se non recedere, utpote contraria facto. *Christen. de Sponsal. quasi. 9.*

*Statuta.*

“**S**Tatuta, Ratione Bonorum sui Territorii, obligant etiam non subiectos; ipsas enim res afficiunt, sive a Cive possideantur sive ab Advena. *Thef. Bes. lit. S. 110. ante finem. addit. p. 902.*

*Steelbow and Heirship.*

**W**Hether a Roun being set in Tack for certain Years with Steelbow Goods, as Oxen &c. will the Steelbow Goods belong to the Heir who has Right to the Tack? Or to the Executor? *Ratio Dubitandi*, Both the Lands and the Goods are set in the Tack as *Fundus Instructus*, and the Duty is payable in contemplation of both: so whoever has Right to the Tack, has Right to both, the Tack being *Jus individuum*. 2.

The Goods are like *nativi & ascriptitii & addicti glebæ*. 3. What is to ly fixed for diverse years cannot be reckoned *inter mobilia*. 4. It were hard to think, that a Relict and Bairns should have their Legitim out of Goods that are not in the possession of the Defunct, nor would be for diverse years. And it would seem, That *eadem est Ratio* as to the setter of the Tack, and his Heirs and Executors.

*Pecora dantur in socidam, cum animalium casus in Pastorem transfertur; qua conventionione pecora ferrea effici & appellari solent; quod fit in multis provinciis Germaniæ; ubi cum fundo certus numerus ovium & vaccarum in feudum dari solet; ita ut Vasallus feudofinito eundem numerum supplere & restituere teneatur.* Befold. Thef. in verbo Eiserh Biehe. lit. E. p. 224.

### Strangers, See Process against Strangers, lit. P.

ALL Nations are *Municipia*, and the World a great *Civitas*: They have that Relation and necessity, that *communis sunt*, and owe Justice to all persons of whatsoever Nation, according to the Law of the place, where they Contract, with respect to that place; *sibi enim legem dixerunt*: If Justice be refused, *datur remedium pignorationis seu Repressaliarum*.

### Goods or Debts belonging to Strangers.

IF *Mobilia* or *Nomina* belonging to Strangers (*v. g.* in England) should be confirmed here? Or if it be sufficient they should be confirmed in England? *Ratio Dubitandi, sequuntur personam*: On the other part, they are a *Scotiſh Subject* or Interest.

### Subjects living Abroad.

A Native Living Abroad and being Popish, and going to the Mass where he liveth, *Quæritur*, Whether he Forfaulteth his Estate in Scotland?

Item, If he Intercommune there with persons Forefaulted in Scotland; whether he be Lyable, as having contravened the Law of Scotland; so that if he have any Estate in Scotland it may be affected?

If a Prince may command a Subject living Abroad under his Enemy to retire and come home? And if he disobey, may he be proceeded against, and be divested of any Fortune and Liberty competent to him as a Native?

“*Quoties Rex, Princeps, vel alius, in alterius Regis vel Principis Territorio bona habet & possidet, ratione quorum, Juramentum fidelitatis præstare solitus est; per hoc non efficitur, ratione suæ personæ, seu personali obligatione, subditus aut subjectus; nec quoad personam fortitur forum nisi secundum quid; ita ut pro tali possessione bonorum conveniri possit, coram Iudice loci, in cujus Territorio bona sunt.* Thef. Bes. in *littera H.* 70. *Huldigung.* p. 402.

Sub.



## Substitutes.

**A** Bond for a Sum of Money being granted to *Sempronius*; and Failzieing of him by decease to *Titius*, and *Titius* his Heirs and Assignes, *Quæritur*, who is Fiar? *Answer*. The first person: *Titius* being only substitute, Failzieing of him by decease; and Successor *in spe*.

*Quæritur*, If *Sempronius* may dispose of the said Sum by Testament as he may *inter vivos*? *Ratio Dubitandi*. That *Titius* is substitute by a deed *inter vivos*. *Answer*. It is thought, he may: Seing such Deeds are upon the matter *Donationes mortis causa*; in which *voluntas est ambulatoria*.

*Quæritur*, If the said Substitute will be lyable as Heir of Tailzie? *It is thought*, he should be lyable; Seing if there were an Infeftment in the terms foresaid, the Substitute could not succeed but as Heir of Provision.

If a Bond bearing the Substitution foresaid be registrate, *Quæritur* If the Substitute (being named as said is) may charge thereupon? *Answer*. It is thought, not; because the Bond being registrate, is a Decreet as to the first Person: but the Substitute having only right, *instar hæredis* by Succession; he cannot charge no more than an Heir of Provision.

## Substitutio.

**S**ubstitutio est Designatio secundi, vel ulterioris hæredis.

*Substitutio vulgaris* est ea quæ fit in casu vulgari, hæreditatis non aditæ nec acquisitæ. Perez. Institut. lib. 2. tit. 15.

*Substitutio Pupillaris* est, qua Parentes Liberis suis in potestate sua & impuberibus substituunt, in casu mortis ante Pupillarem ætatem, & acquisitæ hæreditatis.

*Constitutione Divi Marci & Veri*, substituens in alterutrum casum dantur vel *Vulgaris* vel *Pupillaris* substitutionis, in utrumque substituisse intelligitur; alterum sciz. expresse, alterum tacite. Perez. Ibidem.

*Quæritur*, De substitutionibus in Taliis nostris, istis verbis, viz. Cum Terræ disponuntur Titio & hæredibus suis de corpore suo prognatis; quibus deficientibus hæredibus masculis &c. *utrum sunt pupillares an vulgares?* *Responsio*. Eas utramque Substitutionem continere: Deficientibus enim Hæredibus institutis in primo gradu, quolibet casu, siue non adierint, siue hæreditatem adierint & defecerint, ad substitutos hæreditas pertinet.

## Substitution in Bonds.

**A** Bond being granted to the Creditor, and failzieing of him by decease to another person, *Quæritur*, If the Person substitute will be lyable to the Creditors Debt, at the least *pro tanto*; Seing the Sum was *in bonis*, and his Debt ought to be satisfied out of his Estate?

If such Bonds may be altered by the Creditor, not by uplifting which he may do being Fiar, but also by changing the Bonds, and taking the same to himself and any other person, or to his Heir? Seing the Bonds seem to be a perfect Donation in favours of the Substitute: and on the other part they may be thought *mortis causa*.

If

If the Creditor may dispose of such Sums by Testament?

A Bond being granted by diverse Persons to my Lord Dundonald, and failzieing of him by Decease to his Son the Lord Cochran his Heirs and Executors: and after the decease of Sir John Nicolson one of the Debtors, he having taken a Bond of Corroboration from his Brother Sir William to himself; and failzieing of him by decease to his Grand-child then Lord Cochran (his Father being deceased:) *Quæritur*, Seing the first Bond stands as to the rest of the Debtors; Whether the Lord Cochran his Fathers Executors, will have Right to the same? And what course shall be taken to get the Right of the former Bond settled in Cochran's Person?

*Quæritur*, If the former Bond being null; and in the Bond of Corroboration there be an Obligement to Interest; if the nature of the Sum as to the former Quality of Moveable, be altered?

A Bond being granted to Robert Selkirk Merchant in Edinburgh, and Katherine Inglis his Spouse, the longest liver of them two in Conjunctie; and failzieing of them both by decease to Robert Selkirk their lawful Son, and to the Bairns lawfully to be procreat of his Body; which failzieing, to the other Heirs lawfully procreate, or to be procreate betwixt the said Robert and his said Spouse: Which all failzieing to the said Katherine Inglis her own nearest and lawful Heirs, Executors or Assignes: with this Provision, That it shall be leifum and lawful to the said Robert Selkirk Elder at any time dureing his lifetime, *vel in articulo mortis*, by himself alone, to uplift, discharge, or otherways assign and dispone the Sums in the said Bond, in haill or in part, to any Person or Persons, he shall think expedient, and to make and grant all Writes, Rights, and Securities requisite thereanent, in due and competent Form, without the Contents and Subscriptions of the said Katherine Inglis his Spouse and Robert Selkirk his Son or his foresaids, had or obtained thereto in any sort.

The abovementioned Robert Selkirk the Husband, and Robert Selkirk his Son being both deceased, without Heirs either of the Body of the said Robert Selkirk Younger, or of the Marriage betwixt the said Robert Elder, and the said Katherine Inglis; so that the said Katharine has Right to the said Bond: *Quæritur*, Whether the same will pertain to her in her own Right as Fiar, or as substitute in the last place, and representing the Fiar? And who is Fiar by the said Bond, Whether the said Robert Elder his Son, or the said Katharine, who pretends to be Fiar, because the Right of Succession terminats upon her and her Heirs?

*It is Answered*, That albeit when a Bond is conceived simply to two Persons in Conjunctie, and the Heirs of one of them; the Person to whose Heirs the Sum is provided is understood to be Fiar; yet when there are diverse degrees of substitution of the Heirs of diverse Persons; the Person whose Heirs are first substitute is Fiar; and both his own Heirs substitute in the first place, and the other Heirs of any other Person substitute after them, will be Heirs of Provision to him: As when a Bond is taken to a Husband and his Wife, the longest liver of them in Conjunctie, and to the Husbands Heirs; whilk failzieing, to the Wife her self and her Heirs; tho the Right of Succession as to the said Bond does terminate upon the Wife and her Heirs, yet the Husband will be Fiar, both as *dignior*; and because the Right of the Sum will pertain to his Heirs in the first place: and to the Wife and her Heirs only upon their failzieur, and as Heirs of Provision to them;

them: And *Therefore*, In the present case, the Money being lent by the Husband, and being provided after his decease to his Son *Robert*, and the Heirs of his Body, whilk failzieing, the Heirs of the Marriage betwixt the Husband and the Wife; and to the Wifes Heirs, only in the last place: *It is thought*, That her Husband is Fiar, and that the Wife and her Heirs will only have Right as Heirs of Provision unto him: And if *Robert* should have had Children, or if there had been other Children to the said *Robert* Elder by the said *Katharine*, it were absurd that they should have had the Right of the said Sum, which was lent by the Husband, not as Heirs to him, being their Grand-father or Father, but as Heirs to the said *Katharine*, being their Mother or Grand-mother; or that the said *Katherine* surviving her Husband should have power as Fiar of disposing the said Sum; or to have given it to a second Husband, in prejudice of the said *Robert* her Son, or the Heirs of his Body, and the Heirs, if there had been any thereafter, procreate of her Husband and her, tho descended of both.

If it be found by the Lords, that either the said *Robert Selkirk* Elder, or his Son *Robert* was Fiar; the said *Katharine* must be served Heir of Provision to the Fiar.

### *Substitution in Legacies.*

A Legacy being left to a Person, and failzieing of him by decease to another. *Quæritur*, What the Import of that Substitution is? *Answered*, It is thought, That it is *Substitutio Vulgaris*; and that the Effect of it is, That if the Legatar die before the Testator, so that the Right do not take effect in his Person, it should belong to the Substitute: But that is not *fideicommissaria*; So that the Legatar dieing after the Testator, it would belong to his Executors, and not to the Substitutes.

### *Successio in Maternis.*

A Grand Father upon the Mothers side, having the time of his decease two Daughters, and Children of a third Daughter, *Quæritur*, If the two Daughters will only succeed, and exclude the Children of the third? *Ratio Dubitandi*, That Representation is in order to the standing of Families, and in the case of Primo-geniture; whereas in *Successione materna* the Interest of Families is not considered; seing the Grand Children by their Mother has not so much as *caput in Familia*: And for the same reason, *mobilia*, because they are not the Foundation of Families, admitt no Representation. *Answer*. It is thought, by our custom, The Children of the deceased Daughter will succeed with their *Matertera*: *Et non potest reddi ratio omnium quæ a majoribus constituta sunt.*

If the Children of the deceased Daughter do succeed, *Quæritur*, If the deceased Daughter has left Sons and Daughters, whether the eldest Son of the said Children will succeed to their Grand Father? Or if all the Children will be Heirs Portioners as to their Mothers part? Seing for the same reason, that their Mother and Aunts are Heirs portioners viz. That they are *finis Familæ*; *a fortiori* they who are not *in Familæ* at all ought to be Heirs portioners. *Answer*. It is thought, that the eldest Son of the deceased



Daughter will succeed as Heir portioner with his Aunts; and the Law doth favour not only Families as to preservation after they are constitute, but likewise as to their Constitution: And the eldest Son, albeit he be not in *Familia materna*, may constitute and be a head of a Family of his own.

### *Successio in Stirpes.*

“SI duo Conjuges ita testentur, post utriusque obitum utriusque hæredes ex æquo successuros & hæredes fore; tunc non in capita sed stirpes succedunt, & in duas æquales portiones hæreditas dividenda est; quia quilibet suos hæredes æque dilexisse creditur; & illis ex æquo prospicere. *Thef. Bes. verbo. Gleich. 62. P. 323. & 324. sect. ult.*

### *De Successione in Feudo amisso, & quo Jure censenda, utrum Hæreditatis an Conquestus.*

“*Q*UÆRITUR De Feudo amisso & reverso, quo Jure censendum sit, utrum Hæreditatis an Conquestus; & de omnibus commissi speciebus competit, sive ob Alienationem, sive Disclamationem, sive Presturam vel Baratriam, aut qualemcunque Feloniam, aliudve delictum, feudum apertum dicatur; Sed quia Recognitio frequentissimus apud nos feudi ex commissio vindicandi modus increbuit, de ea & praxi nostra maxime solenni, & textui accommodatiori, quæstionem agitabimus: Decisionem ad reliqua commissi indistincte porrigendam præfati. *Quæritur* igitur, cum Superior feudum per Recognitionem sibi asseruit, utrum feudum Recognitum post obitum ipsius, ut conquestus ascendat? An vero ut hæreditas cum feudo dominanti descendat; posito feudum dominans hæreditarium esse?

“*Quæstio* hæc in se difficilis, & gravissimas consequentias secum trahens, haud æquali tamen difficultate in omnibus Recognitionis speciebus laborat: Quod ut patefiat, sciendum duas apud nos invaluisse Recognitionis species, ex causarum diversitate diversas; unam ob defectum Vassalli, alteram ob delictum: Ex posteriori causa, feudum ob delictum & admissum Vassalli dicitur proprie committi: Ex priori, Vassalli profapia, quam in prima feudi concessione dominus ad feudi successionem assererat, extincta, feudum dicitur finiri; & cum stemmate in quo resederat expirare: si enim ab initio, contestum est alicui & hæredibus masculis ex ipsius corpore progenitis, vel descenditibus masculis; Vassallo mortuo, nec ullo ex descenditibus masculis superstite, dominus feudum ab hæredibus tallia, vel per foeminas descenditibus, revocat; & hanc feudi revocationem *Balsurius* Recognitionem vocat, & ejus praxin prodidit in *Tract. de Recognitionibus, datam 18. Decemb. 1506. Regio Advocato agente contra Joannem & Margaritam Auchtrans hæredes, alterum tallia, alteram linea*: Et hoc Genus Recognitionis etiam in feudis Francis locum habet: feudum hac ex causa revocato, etsi dubitari potest, utrum in persona domini ad quem revertitur, Hæreditatis an Conquestus naturam induat; certum est eodem jure quo feudum dominans censeretur, eandem naturam & qualitatem sortiri respectu successionis; & omni alio respectu

"spectu, qui ex distractione & divisione propriorum seu hæreditatis & con-  
 "questuum, secundum nostram consuetudinem posset emergere. Quin  
 "etiam, hoc casu non solum Dominium directum dominium utile attrahit,  
 "sed possessio civilis possessionem naturalem advocat; adeo ut Dominus dire-  
 "ctus possessionem naturalem nactus, non dicatur novam adeptus, sed vete-  
 "rem continuare possessionem, astipulantibus omnium doctorum suffra-  
 "giis, in *L. clam possidere. ff. de acquirenda vel amittenda possessione*: Et hæc  
 "feudi extincti redintegratio adeo Æquitate & Ratione subnititur, ut fi-  
 "at in eodem qualitatatum statu quibus feudum dominans afficitur, tam  
 "quoad usumfructum, *ff. de usufructu*: quam hypothecam *L. si fundus*  
 "*in principio ff. de pignor.* Et servitutes ex fundo dominante debitas:  
 "idque optimo Jure, quia accessio per modum unionis coiens, eandem pro-  
 "fus rem constituit, & res cui unitur omnes suas Qualitates ei impertitur.  
 "L. 26. *ff. de pacto dotal.* Atque hæc decisio, firmissimo & irrefragabili  
 "Argumento nititur; quod dominio utili, quod per infeudationem a di-  
 "recto discesserat, extincto, & per modum meræ privationis annihilato,  
 "nihil domino cedit, aut acquiritur; sed proprietas, quæ abscedente u-  
 "sufrectu & dominio utili eatenus fuerat inutilis, eo perempto pura & de-  
 "fæcata emergit: ideoque dominium utile non redit; sed in persona pro-  
 "prietarii quasi recidivum reviviscit, & dominus nil nanciscitur, sed quod  
 "ante habebat, sed gravatum jure reali in alium devoluto, eo jure evanes-  
 "cente illibatum, & quasi purificatum incipit obtinere; sicut cum fini-  
 "tur Emphyteusis vel usufructus, vel cum res revertitur ad mulierem  
 "soluto matrimonio *L. in rebus. C. de jure dot.* Cum igitur nulla hic sit  
 "Accessio nec Transmissio, sed mera privatio & extinctio, nulla potest  
 "esse acquisitio. Argumenta, quæ hanc sententiam enervare videntur,  
 "quia in alteram Recognitionis speciem opportunius & fortius stringi  
 "possunt, solvere supersedeo, donec eam absolvero.

"Secunda Species, quæ, proprie & ἀπαρασυστήτως Recognitionis no-  
 "mine usu nostro indigitatur, procedit, cum Vassallus feudum militare,  
 "vel saltem ejus partem medietate majorem, quomodocunque, vel sim-  
 "pliciter vel sub pacto de retrovendendo seu reversione vendit, domino  
 "inscio & inconsulto; vel saltem ita gravat annuis redditibus, aliisve oneri-  
 "bus, ut major pars fructuum quorannis erogetur, & exhauriatur; quo ca-  
 "su feudum amittitur & ad dominum revertitur, ait *Textus*, & mores no-  
 "stri suffragantur: sed quo jure, utrum hæreditatis an conquestus am-  
 "bigitur, & adhuc sub judice lis est: Certe majori difficultate, & fortio-  
 "ribus argumentis hic, quam in superiori specie conflictandum est; ibi  
 "enim feudo naturaliter finito & extincto sine facto Vassalli, nec ulla extrin-  
 "seca causa interveniente, nulla erit transmissio juris extincti & elapsi, sed  
 "virtute directi domini utilis attractivi, naturalis consolidatio. Sed in hac  
 "specie feudum in se perpetuum de se non finitur, sed per accidens, ideo-  
 "que nova videtur acquisitio in pænam ingratitude, & sic veluti ex  
 "causa lucrativa juxta *L. apud Celsum. §. auctor. ff. de dol. mal. & met.*  
 "except. Secundo, Feudum recognitum hæreditas videri non potest, cum  
 "non tam per virtutem prædecessorum successione transmittatur, quam  
 "per emergentem delicti Vassalli occasionem, jure obventionis lucrativæ  
 "quæ omitti potest, patrono accedere videatur. Adhac, cum subfeuda in  
 "eodem supposito cum feudo dominanti confluentia, non necessario cum  
 "eo coalescant; nec in consequentiam Consolidationis & unionis, eadem  
 "jura

"jura qualitatesque participant; quicquid enim nonnulli sentiant, ex quibusdam legibus male intellectis, confusionem & consolidationem attruentes, *L. Uranius ff. de fidejuss. L. Papinianus ff. de servitut. urban. prad.* clarioribus legibus refelluntur; quibus cuilibet rerum suarum moderatio & arbitrium permittitur, *L. in re mandat. C. mandat. L. nemo exteris C. de Judais*; & receptæ & triviali praxi frustra oppedunt; Constat enim subfeuda a domino superiori empta, in eodem supposito coire non tamen uniri; sed in casu divisionis ab antiqua hæreditate dirempta ad hæredes conquestus transire; idque apud nos observatur, & in Gallia ubi Jus Consuetudinarium dominatur expresse sancitum est. *Tertium* & ultimum Argumentum, quod maxime officere videtur ne feuda recognita hæreditas judicentur, ducitur ab incommodo; si enim feuda recognita, feudo dominanti virtute consolidationis ut hæreditas accedunt, sequitur feudi dominantis annexatione & incorporatione domanio & coronæ *D. Regis* facta, & subfeudo aperto & commisso, subfeudo, inquam, quod ante incorporationem elocatum fuerat, (post enim, non licet, ne secuta dissolutione, proprietatem semel annexam alio modo quam in Emphyteusim dare, *Constit. 234. Jacob. sexti.*) feudum illud domanio accrescere & inalienabile esse, sicut reliquum domanium & patrimonium fiscale & publicum, non tam principis quam Majestatis & coronæ; nec nisi prævia dissolutione posse a Rege disponi, quod absurdum: nec enim serenissimis nostris Regibus denegari debet libertas, quam feudistarum Coryphæi *Andreas Isernia & Mathaus de afflictis*, omnibus principibus attribuunt in *L. Imperial. § præterea ducatus tit. 55. de prohib. feud. alien.* Et Galli domanii & Appannagiorum ex Lege fundamentali inalienabilium acerrimi assertores, regibus suis non invident: his non obstantibus, in alteram partem non solum propendeo, sed pedibus eundem censeo; eamque moribus nostris, juri feudali & civili magis consentaneam, nec tot tantisque incommodis laborantem, argumentis astringere, & contraria diluere, conabor.

"Primo igitur, feuda recognita moribus nostris inter Propria seu Hæreditaria numeranda ex eo patet, quod Jure hæreditario & antiquo a prædecessoribus transmissio vindicata; quodque non per modum transmissionis sed extinctionis & negationis ad Dominum devoluta sint: quamvis enim, ut in priori specie, feudum non expirarit, & per se extinctum sit; quia tamen accedente Vasalli culpa, feudum vel ipso Jure vel prævia sententia corrui; ideo merito dicitur extingui & irritari, ut Emphyteusis in se perpetua, ob desidiem & Cessationem Emphyteutæ biennalem annihilatur & extinguitur Jure canonico & Civili; & Jure nostro scripto, constitutione 246. *Jacobi Sexti*; Ubi amissio & irritatio Emphyteus vel feudi ex Jure æquipollere dicuntur; irritatio autem & transmissio ex diametro adversantur, illa enim penitus annihilat & extinguit; hæc Jus ab uno avocat & in alium transfert; cum igitur nil supersit, quod transmitti vel acquiri posset, necesse est Jus Dominicum se exferat; & nullo obice obiecto, Dominio utili, quod habebat vasallus, extincto, Dominium utile vi quadam alliciat; vel virtualiter proprietati & Dominio directo insitum & quasi sopitum resuscitet: & sic nulla somnari potest acquisitio nec Domini directi quod Dominus ante habebat; nec utilis quod interit: & Dominium utile quod Dominus incipit habere non de novo transmissum accedit, sed antiquum per infeudationem suppressum,

"ea



“ea resoluta, eniritur & sese exserit; atque hoc moribus nostris ita fieri, argumentum est, quod cum feudum reddit ad Dominum, non cum onere quod in transmissione fit, revertitur, sed immune & liberum sicut ante primam infeodationem: adeo ut non solum alienationes & investiturae quae initio validae, utpote citra medietatem factae constiterant, recognitione subsequente corrumpantur, sed etiam Subinfeodationes & Emphyteuses quamvis ab initio recte constitutae, ex post facto subvertantur, & recognitioni subiaceant: secus quam in Gallia ubi feuda Domino aperta oneribus a vasallo impositis obnoxia sunt, Teste *Molinao*.

“Atque hanc sententiam juri feudali maxime esse consentaneam, facile liquebit, perpenſa natura feudi: Feudum nonnulli definiunt dominium utile; sed meliores Jurisconsulti, explora Domini distinctione quae non Juris sed Magistrorum est, nullum utile Dominium admittunt; sed feudum usufructum & Jus utendi fruendi esse volunt *Cujas. lib. 1. de Feudis. Duar. lib. 1. univ. disp. Egumarius. Baro, lib. 4. de Beneficiis. Joannes Borcholt. in disp. De Jure Emphyteutico*. Et textu feudali expresso nituntur, qui definit Feudum Beneficii usufructum, *lib. 3. tit. 1. de feud.* & primo quidem precarium, vel annuum, vel ad summum vitalem, *lib. 1. tit. 1.* postea, usu gliscente perennem, *lib. 3. initio*. Sequitur igitur ex Jure feudali, feudum, ut omnem usufructum, semel amissum & peremptum, non posse acquiri vel transmitti; sed cum proprietate consolidari; vel concinnius loquendo, dicendum usufructum causalem, quem dominus habet ex causa rei & jure Domini. *L. Si cum argentum. § penult. de exceptionibus rei judicatae* & quasi Domini partem *L. 4. ff. de Usufructu*; & qui usufructu formali (ut loquuntur Doctores) impediatur, quo minus se exsereret; eo repagulo per sententiam declaratoriam & privativam, secundum Dominum latam, substracto, emicare quasi & emergere. Secundo, cum quis rem ob causam aliquam datam causa non secuta, recuperat conditione causa dati ex Jure Civili, connotat rem eo modo receptam cum omni causa & omnibus fructibus redire, quasi nunquam data fuerit. *L. qui se debere. § Fundus ff. de conditione causa data causa non secuta*: Et consequenter, si quis fundum hereditarium dotis nomine dederit, & nuptiis non secutis postea condixerit; post conditionem, hereditarium esse nemo est qui diffiteatur? pari ratione, si feudum hereditarium aliquis in feudum dederit, & fidelitate quam stipulatus fuerat in perpetuum, vel nunquam secuta vel temerata; postea recuperarit conditione causa dati quae adversus vasallum infidelem Jure feudali intentatur, *tit. 20. lib. 1. de feudis* non dicitur de novo acquisisse sed cum pristino Jure & causa recuperasse, quod si in persona primi concedentis feudum apertum non censetur conquestus, nulla est ratio diversitatis in persona hæredis, aut aliqujus descenditis.

“Tertio loco, Decisionem hanc a Jure Civili & ratione non alienam esse, abunde demonstrant trita illa Axiomata & Brocardica, Neminem sibi servire aut in se agere posse, *L. si quis ades. ff. de servit. præd. urban.* Omnem obligationem per confusionem extinguere & exinaniri, *L. Uranius. ff. de fidejussor.* & Maximæ Philosophicæ, ex relatis uno sublato tolli alterum; & idem agens & patiens in rerum natura concipi non posse: & consequenter eundem Dominum & vasallum esse absurdum videri; & proinde feuda necessario consolidari: præterea, quamvis omnium doctorum calculo, Jus feudale Jure civili posterius, eoque plerisque in locis ex-

"lescente quasi posthumum sit, certum tamen est in Jure civili nonnullas  
 "quasi umbras & feydomum simulachra reperiri; a quibus ad feuda non  
 "inepte ducitur consequentia; & ut omittam prædia stipendiaria nec  
 "mancipi, de quibus mentio fit in § per traditionem *U. instit. de rerum*  
 "divisione; & militias, in *L. omni modo. C. de inofficioso Testamento*;  
 "clientelas, de quibus passim toto Jure: & Jus *Naquian* seu Libellari-  
 "um, cujus meminit, *Just. novella septima*. Jus Emphyteuticum omnium  
 "judicio Juri feudali maxime affine est, & hoc ad ejus exemplum, &  
 "ideam conditum videtur, Dominio utili seu usufructu in perpetuum e-  
 "locato, & conditione servitii & *indutius* seu præstationum pro melio-  
 "ratione & canone Emphyteutico subjecta; & in casu inofficiosa aliena-  
 "tionis vel contumacis cessationis privatione irrogata: Unde fre-  
 "quentissima ultro citroque argumentatio fit, & quod in uno statuitur, ad  
 "alterum a doctoribus producit, nisi expresse contrarium statuarur: Con-  
 "cludendum igitur, feuda aperta extinguere & consolidari, sicut Emphyteuses  
 "de quibus nunquam dubitatum est a Juris interpretibus; præsertim cum  
 "verba Juri omnia negativa & privativa sint, nullamque transmissionem  
 "aut ex parte Domini acquisitionem importent, *L. 2. C. de Jure Emphyt.*

"Atque his argumentis, feuda commissa feudi Principalis Jure centeri e-  
 "vincitur iis, incommoda quæ contrariam sententiam gravant, quasi in sub-  
 "sidiis subtexere non erit alienum: inter multa alia hæc eminent, 1. quod  
 "posita subfeuda recognita conquestus esse, sequitur pendente fundi Do-  
 "minantis usufructu, aperta usufructuario acquiri; ut omnes rei fructilis  
 "obventiones, idque non solum quoad usumfructum sed etiam quoad pro-  
 "prietatem, per *L. usufructu legat. §. 1. ff. de usufructu*. 2. indidem se-  
 "quitur, feudo dominante sub pacto de retrovendendo seu reversione  
 "alienato, & postea ex lege pacti redempto, subfeuda medio tempore re-  
 "cognita fiant, reliqua commoda & fructus emptori non eripi; sed utcuq-  
 "que ampla & opima latifundia cum pretio refuso penes eum remanere.  
 "denique venditorem fundi dominantis, quamvis ipsum cum omnibus  
 "viribus & pertinentiis alienet, subfeudum ante alienationem commissum,  
 "Domino seu Emptore invito, posse recognoscere; nec Jus commissi, ut Re-  
 "vium, & alia ante venditionem cessã & venditori adquisita, ad Empto-  
 "rem pertinere: Quæ consequentiæ quam cum ratione & praxi nostra  
 "congruant, judicandum relinquo.

"Hactenus sententiam, quæ tam in Jure quam praxi nostra potior videtur,  
 "utcumque probavimus; supersunt argumenta, quæ supra in contrarium  
 "proposuimus, quorum solutionem, licet ex prædictis facile eliciatur, pau-  
 "cis persequemur. primum & secundum facile concidunt, sicut enim non  
 "refert, quomodo aut qua occasione usufructus finiatur, sive per se, morte  
 "usufructuarii naturali vel civili; maxima & media capitis diminutioni-  
 "bus, an per accidens, cessione & proprietatis consolidatione *Inst. de usu-*  
 "*fructu*: Sed quomodocunque finitus ad proprietatem revertitur: ita  
 "feudum, Jure Vasalli quomodocunque extincto, sive naturaliter ut  
 "in priori recognitionis specie; sive ex commissio, ad Dominum redit, &  
 "primævam suam naturam recuperat; nec obstat posterior pars secundi  
 "argumenti, quæ consolidationem fundorum dominantis & subalterni in  
 "casu concursus in eodem supposito non necessariam esse concludit; quia  
 "vera est tantum in casu transmissionis quæ fit jure extraneo & heteroge-  
 "neo, ex titulo emptionis, legati, vel successionis si Dominus hæres sit vasalli,  
 "quo casu feudum transmittitur cum onere a vasallo imposito; cum enim  
 "feudum

"feudum sit jus transmissibile, quin Dominus hæredibus suis qui forte a  
 "successione feudi dominantis tallia aut alia provisione arcentur, consulere  
 "potest feudo acquisito, & citra consolidationem ad ipsos transmittendo,  
 "dubium non est: atque hæc in feudo & Emphyteusi qui sunt usufructus  
 "perpetui recepta sunt, contra Juris Dispositionem de temporali usufructu  
 "qui nec cedi nec transmitti potest, *L. si usufructus. ff. de Jure dotium*, &  
 "*Inst. de usufructu*: quæ tamen illæsa & illabefacta manet in casu extin-  
 "ctionis & commissionis, qui necessario consolidationem & in pristinum  
 "statum sine onere redintegrationem implicat. Ad postremum respon-  
 "detur, cum Subfeudorum consolidatio luculenter demonstrata sit; & sub-  
 "feuda Domanio seu proprietati annexa consolidata, ipsius naturam & qua-  
 "litates & inalienabilitatem assumere; & doctorum, qui contrarium re-  
 "nent, auctoritatem, quia ratione non fulcitur, authenticam non esse:  
 "Et hæc est Juris civilis dispositio, juxta *L. inter socerum. ff. de pacto do-*  
 "*tali*: sed praxis, quæ plerumque a Jure recedit, & hic & in *Gallia*, adversa-  
 "tur; & Rex subfeuda etiam domanio annexo subalternata, alienare po-  
 "test, nec requiritur dissolutio: Ratio praxeos hujus ~~antiquæ~~ hæc obtendi-  
 "tur, quod cum annexatio sit stricti Juris & odiosa, utpote quæ absolutam,  
 "& ut leges ipsæ loquuntur, legibus solutam Principalis potestatis plenu-  
 "tudinem coarctat, nullam extensionem patitur; ideoque ea tantam, quæ  
 "expresse annexa sunt, Domanii annexi Jure censentur; non antem ob-  
 "ventiones & quantumvis hæreditariæ accessiones. In *Gallia* certe luculen-  
 "ta *Caroli novi* constitutio definit, nil Domanio annexo comprehendendi,  
 "nisi quod expresse & diserte consecratum & coronæ incorporatum est,  
 "vel saltem per decem annos ab iis qui a rationibus Regiis sunt Domanio  
 "annexo accensitum est; dispar tamen ratio est in *Gallia* & apud nos; ibi  
 "enim feuda a genuina feudorum puritate disciverunt, & tantum non  
 "Alaudiorum & Patrimonialium Jure censentur, & proinde ad Dominum  
 "cum onere commissa revertuntur: apud nos vero tantum abest ut stricta  
 "illa feudalis tyrannis, quæ rei suæ dispositionem annihilaret, emolliatur,  
 "ut contra intendatur; adeo ut vassallus, Domino inconsulto ne finium re-  
 "gundorum experiri posset, nedum de feudo transigere, quod tamen Jure  
 "feudali licet, *tit. 23. lib. 4. de feudis*. Et feudum rescissum proditur, ob  
 "deteriorationem & sylvarum stragem; cujus praxin refert doctiss. *Cragius*  
 "inter *Davidem Boner de Rossye* & *Joannem Chrichson de Ennemythie*.  
 "Concludo feuda subalterna ab antiqui seu hæreditarii feudi Domino re-  
 "cognita, hæreditati non conquestibus accenseri, & feudo Dominanti  
 "consolidari.

### *Succesor Titulo lucrativo.*

**I**F the Heir of a Succesor *titulo lucrativo*, be lyable as himself, to the whole  
 Debt contracted before, though exceeding the value of the Estate dis-  
 poned? *Ratio Dubitandi*, The Title of Succesor is a penal and passive title,  
 and *pæna non transit in Hæredem. 2do*. The Heir of an Intrometter was found  
 only lyable in quantum the intrometter was *Locupletior*, in the case of  
 in *Lauder*: And on the other part, a Succesor *Titulo prædicto*, is hæres per  
*præceptionem*, & hæres quasi contrahit: So that he is not lyable *ex Delicto*, but  
*ex quasi Contractu. 2do*. The Intrometter is lyable *ex culpa*; For a Stranger  
 may be Intrometter, & *culpa est immiscere se rei ad se non pertinenti*.

If



If a Defunct should Resign Lands formerly tailzied, and infest his only Daughter in Fee: Will she be lyable as Successor *titulo Lucrativo*? *Vide Intrrometter, Quæstiones. 1 & 2. in Litera I.*

If he should infest in Fee his Appeirand Heir of Tailzie, having a Daughter who succeedeth to him in his other Estate: Will the Heir male be lyable as Successor *titulo Lucrativo*?

*Quæritur.* If an Heir male being to succeed by a Right of Tailzie, getting a Right of a part of the said Lands; will be Successor *titulo Lucrativo*? *Ratio Dubitandi,* The Heir male is not *proprie hæres*, being only a collateral; and there being an Heir of Line.

If an appeirand Heir get a Right only of a Liferent of Lands, whereunto he was to succeed: will he be Lyable as Successor *titulo Lucrativo*?

A person being Lyable to Creditors, and then having put his Appeirand Heir in Fee of his Estate; and thereafter being forefaulted: *Quæritur.* If after his decease his Appeirand Heir will be lyable *titulo Lucrativo*? *Ratio Dubitandi,* A Person forefaulted is *nullus*, and cannot be represented.

A Tutor or Factor having accepted the office and Administration; and thereafter having put his Son in the Fee of his Estate, before he can be charged with any Malversation; *Quæritur,* If his Son will be lyable *titulo Lucrativo*, for any malversation after his Fee? *Answer,* It is thought he will be lyable; seeing the accepting the office and obligation *ex quasi Contractu*, is before the Fee.

A Father having given his Daughter an Estate in Land (or otherwise) in Tocher to her Husband, and reserving his own Liferent, would she be thought to be Successor *Titulo Lucrativo*, if she be his Appeirand Heir? *Ratio Dubitandi,* It is given to the Husband and not *titulo Lucrativo*; In respect the Husband has Right by a Contract, and in contemplation of *Onera Matrimonii* and the Ioynture he gives his Wife.

If at least the Tocher in so far as it is *immodica*, may be questioned and retrenched in favours of Creditors?

A Merchant in *Edinburgh* having married a third wife, and by Contract of Marriage being obliged to employ Twenty two thousand merks upon a Right of Lands, or Annualrent, to himself and his Spouse in Liferent and conjunct Fee, and to the Heirs of the Marriage; which Tailzieing to his Heirs and assigneys: And thereafter having Disposed certain Lands for implement of the said Contract, to the eldest Son he had then of the said Marriage, which Tailzieing to his own Heirs and Assigneys. *Quæritur,* If the eldest Son and his forsaids will be lyable to all precedent Debts as Successor *titulo lucrativo*? *Ratio Dubitandi.* That he was only a Son of a third Marriage, and his Father had Sones of a former Marriage. *Answer.* It is thought, he will, notwithstanding, represent his Father; In respect the said Right is for implement of the said Contract, as said is; and if the said Sum had been employed, conforme to the Contract, he would have represented his Father: And by the said Right he represents him *per præceptionem*: And that he would be lyable *suo ordine* as Heir of the Marriage, the Heir of Line being discusst.

*Quæritur,* In the case foresaid, if the said Son of the third Marriage will be lyable to Debts contracted after his Right by his Father? Seeing his Father is obliged, that he should succeed him in the Right of the said Sum: And the Creditors ought not to be in worse case, than if the said Sum had been

been employed, and *Sucessores titulo lucrativo* are not lyable to posterior Debts, when the Right granted to them is *mera Donatio*: So that their Father was not obliged that they should succeed: And the Father was a Merchant, and continued his Trade thereafter, and became Bankrupt. *vide Heirs. Quest. 3. in Litera H.*

If a Gentleman, by his Son's Contract of Marriage dispone his Estate to him, will he be lyable to all the Debts, or only effeirand to the value of the Right?

An Uncle having Disposed to his Nephew his Lands or others, being for the time his appearand Heir; and having Died without Children, *Queritur*, whether he be lyable as *Sucessor Titulo Lucrativo*? *Ratio Dubitandi*, he was only presumptive Heir: And the Uncle might have had Children if he had married again: And upon the reason forsaide, if the Lands had holden ward they would have recognized.

An Appearand Heir being Infeft in Liferent in Lands to which he might have succeeded, *Queritur*, whether he will be *Sucessor Titulo lucrativo*, specially if the Liferent be settled upon him, and the Fee upon his eldest Son?

### Singular Successors.

*Queritur*, If the Act of Parliament anent Registration of Seafins, as to singular Successors, should only be understood such as have acquired Right from the common Author; and not Comproysers and such as succeed upon account of Forefaulture?

### Sums heretable and movable.

Lands being Disposed by a Contract; and the Buyer being obliged to pay the Price, *Queritur*, whether the Seller's Heirs or Executors will have Right to the said Price? *Ratio Dubitandi*, The Price cometh in Place of the Lands, and the Heir will be obliged to denude himself of the Right of the Lands; the Disposer's obligation being only prestable by his Heirs: So that it seems the Heirs should have Right to the Price. On the other part, the quality of heretable or movable depends upon the *arbitrium* and Destination of the Creditor himself; and it appears that the Disposer, having sold his Lands for a Price, he intended in lieu of an heretable Estate, to have only a movable Estate in Money; not to ly in the Buyers hands, but to be employed as the Disposer should think fit, either for Trading or otherwise; So that the said sum should belong to his Executors.

*Queritur*, If Sums consigned for Redemption of Land, be of that same nature? *Ratio Dubitandi*, It appears there is a difference upon that consideration, that a Person who has a Redeemable Right does not desire his Money, and the Reversion is *in Rem*; so that the Sums due thereupon appear to be heretable untill they be uplifted, & *surrogatum sapit naturam surrogati*.

*Sums movable.*

**A** Sum being due upon a Wadset, with the ordinary clause, that by the premonition, and charge that should follow, the Infestment should not be loused untill payment. *Quæritur*, If after Execution used the Sum becometh movable? *Ratio Dubitandi*, It is yet due upon Infestment, and it cannot be conceived that the Executors or Donator should have Right to the Infestment, being only in favours of the Heirs.

*Eldest Superior.*

**W**hen Lands are holden Ward of diverse Superiors, The eldest Superior and *antiquior*, is preferable, as to Mariage. *Quæritur*, the forsaide quality of *antiquior*, whether it is to be considered in relation to the Vassal, so that the superior that he did first hold of is to be thought *antiquior*? Or if it be to be considered in relation to the *feudum* it self; so that the feudum that was first constitute by a grant from the King to the Vassals authors, should be thought *antiquior*?

*Quid Juris*, If a Person be infest as Heir to his Mother or her Father to be holden Ward; and thereafter be infest as Heir to his Father, the Lands also holding Ward; whether of the Superiors will have Right to the Mariage?

A Person being infest in Lands holding Ward; and thereafter being infest upon a Compyring in Lands holding of the King, *Quæritur*, If the Mariage through his decease will fall to the King, or the other Superior during the legal? *Ratio Dubitandi*, a Right by compyring is only for security and Redeemable.

*Superior mediat.*

**T**He immediate Superior being found to have amitted his Superiority during Life, because being charged he did not enter, *Quæritur*, If the mediat may infest upon Resignation, being only Superior in that part and *in subsidium*, that the Vassal should not have prejudice by his immediate Superiors nonentry; but not *ad alios effectus*, which may prejudice the immediate Superior; and in special that, by obtruding to him a singular Successor to be his Vassal? That same question may be in the case of Ladies Liferenters, and Conjunctiars of Superiorities.

*Tack.*

**A** Tack being sett in *April* of certain Lands and Houses, whereof some were possest for the time by the Tacksmen by a verbal tack  
or



or Tolerance; others sett to Tennants: and the Tack bearing the Entry to be after separation from the ground *in anno 1652.* in which it was set, *Queritur*; A Comproyser being publictly infest befor separation, if the Tack will not militate against a singular Successor, the Entry being *in debito tempore* after the Setter was denuded? *Answer.* It appears that the Entry, as to the commencement of the Tack, was presently the time of the date; Seing as to the Houses and some of the Lands the Tackfman was in natural possession: and as to the grafs of the Lands sett to a tennant, the Entry though not exprest was at *Whitesunday* following; and the entry mentioned in the Tack seemeth to be meant of the Tackfman's Entry to Labour; & *Interpretatio facienda ut actus valeat.*

If at least the Tack should be invalid as to the Lands which were set to tennants as being not publick by possession? *Answer.* It is thought, that a Tack being *Jus indivisibile, possessio partis* maketh it publick in *Totum*: And it cannot be *ex parte* publick and *ex parte, non.*

A Tack being set to a Tacks-woman during life, and after to her Heirs, until payment of certain Sums, for *Ten shillings* yearly, *Queritur*, Will the Tack be void as without *Ish*? *Answer.* It appears, that the Tack being set for security of Payment of the Money, the *Ish* is not altogether uncertain; *Certum est enim quod fieri potest certum, per relationem ad aliud*; and the Rent being *One Thousand Pounds*, it may be considered in what time that Rent may satisfy the Sum mentioned in the Tack: and upon the matter, there is a Reversion to the setter and his Successors, and they may determine the *Ish* of the Tack by payment of the Debt: *Lady Braid* and her Son assigned the Tack, whereof a Reduction was raised by *Gorgymiln*, having bought the Lands.

Neither Servitudes nor Tacks do affect Lands in prejudice of singular Successors, unless they be real by Possession, *Queritur*, If such Rights may be registrate in the Register of Reversions, albeit the Act of Parliament doth not mention the same? And if they be registrate, if they will be real as Reversions?

*Locatio & conductio* albeit they are not in Law *inter Contractus qui re fiunt*, and by our Custom they are not effectual unless they be *Re*, and cled with possession; before which they are personal as to the Contracters and their Heirs; but after that, they become real Rights, and bind singular Successors, *Queritur* therefore, if a Tack of Lands be set to a Person to enter at *Whitsunday* thereafter? And thereafter another Tack be set to another Person before that Term, so that neither can have Possession? What way the second Tackfman may perfect his Right, so that he may be preferred? *Answer.* It is thought, he may make intimation of his Right to the present Tennent, and require him to remove at the Term, and protest for remeed of Law.

*Queritur.* Why Tacks without Possession do not prejudice singular Successors; and yet Tacks do prejudice beneficed Persons? *Answer.* Beneficed Persons are not singular Successors; which properly are such as do acquire and purchase: Whereas Prelats or Beneficed Persons are *Successores Titulo Universalis*; and are considered as singular Incorporations, whose Deeds do bind their Successors.

When any Person is infest in Teinds, *Queritur*, If he may set Tacks longer than during his Right, in prejudice of the Buyers, or other singular Successors?

A Tack being fet to a Person for *fifteen Years*, without mention of his Heirs or Executors, *Quæritur*, Whether it be merely personal? Or at least the Heir (if the Tackfman decease before expiring of the Tack) should have Right during the time foresaid? *Answer*, It is thought, that Tacks should be *stricti Juris*; and there being no mention of Heirs, the said limitation of time imports only, that the Tackfman should have right if he should live all the said time, and not after: And in Tacks *industria & conditio Personæ* is to be considered, if the Tennent be a substantial and vertuous Person; whereas Heirs may be Infants, and not succeed in the Conditions foresaid.

If a Tack be set by a Church-man to a Feuier and his Heirs succeeding to him in the right of the Feu; if the Teinds of the feued Lands may be assigned, there being no mention of Assigneys? 2. If it may be Compyred? 3. If it cannot be assigned, Will the Tack fall by the Assignment? Tack of the Teinds of *Paikie*.

### *Back-Tacks and Prorogations.*

**W**Hat is the Reason that in Wadsets, Back-tacks are valid without a definite Iss, *viz.* During not Redemption?

*Item*, In Prorogations, Tacks of Teinds to begin after the Iss of the former, though the Titular be denuded in the *interim*? *Answer*, In Wadsets the Back-tack is *in corpore Juris* and the Wadset is with the burden thereof; the Wadset and Backtack being correlative Rights: So that who succeeds in the Right of the Wadset, can have it no otherwise than *cum causa*: As to Prorogations, they are granted *in rem*, and by the authority of the Judge.

### *Tack of Teinds.*

**A** Tack of Teinds being set to a Person and his Heirs and Assigneys, for his Lifetime, and *four nineteen Years* after, *Quæritur*, If he be year and day at the Horn, will the same fall under his Liferent Escheat; only as to His Liferent, or entirely?

If after his decease it would fall under the Liferent or under the single Escheat of his Heir?

If it be for many nineteen years, exceeding the longest Life of any man; Will it fall notwithstanding under a single Escheat, seeing there is not a formal Liferent constitute?

If a Tack for many nineteen years should be assigned; will the same fall under the single escheat of the assigney; seeing there is no liferent as to him, and the liferenters may all die in his lifetime?

Will not the Assigney have Right for the lifetimes of the Heirs, though they be not served Heirs?

The Tack being for three Lifetimes, and certain nineteen Years after; *Quid Juris*, Where the Tackfman has no Heirs, so that there is place to a Gift of Bastardy or *ultimus hæres*?

Tacks of Lands being real by the Act of Parliament in favours of Tennents; *Quæritur*, *Quid Juris*, As to Tacks of Teinds?

*Tailzies.*

## Tailzies.

**W**Hen a person, having acquired Lands, provides the same to his Heirs Male, *Quæritur*, Whether the Maxime viz. *Hæreditas descendit & Conquestus ascendit* has place in Tailzies?

If a Tutor, Intrametring with the Duties of Lands Entailed to the Heirs Male, may not employ the same upon security to the Pupil and his Heirs Male; upon pretence that it should be presumed, that it was in the Parents intention, as appears by the Entail? *Answer*. It is affirmed, that it was so decided in the case of the Heirs of *Cockburns-path*, which we have not seen: But it is thought, that a Tailzie being *Institutio Hæredis*; as a Tutor could not make a Testament for his Pupil, nor name an Heir and Executor for his Pupil, so he could not make a Tailzie either in Land or Money.

There being a Tailzie in these terms, that it should not be lawful to break the same; and the Fee having descended to a Woman, by vertue thereof; who did notwithstanding resign the Fee in favours of the Husband and the Heirs of the Marriage, which Failzieing to the other Heirs of the former Tailzie; and thereafter the said Heir of Tailzie having obtained a Decreet of Reduction of the said Right *Ex capite Minoritatis*, for eviteing the hazard of the Clause irritant in the first Tailzie; albeit the Right granted to her Husband was ratified in Parliament, with the clause that the Ratification should not be Lyable to the Act *Salvo Jure: Quæritur*, If the Husband be Forefaulted and his Posterity disabled, if the Heirs of Tailzie having Right to succeed after the Wife and her Children, may be prejudged by that Forefaulture? *Answer*. It is thought, not; Seing the Husband was not in the Fee, the time of the Forefaulture, the same being taken away by a Reduction.

If the Woman should thereafter Marry, and have Children the time of her decease but disabled. *Quæritur*, If the Children of the Husband, who would otherways succeed, if the Father were not Forefaulted; will Forefault the Right of the said Estate to the King, and will be in the case of a person that is Forefaulted, and has Right of Succession to the Estate as Apperand Heir? *Cogitandum*.

Seing there may be Quæstion, *Quæritur*, what course shall be taken to prevent it? *Answer*, It is thought, that a Gift may be procured from the King, making mention of the Forefaulture and Dishabilitation; and notwithstanding, that His Majesty is not willing that the persons who are to succeed, Failzieing the Wife of the Forefaulted person, and the Heirs of her Body, should be prejudged; having been Faithful and Active in opposing the late Rebellion: *Therefore*, He doth ratify the said Tailzie in so far as concernsthem, and the Right of Succession; Declaring that it shall not be prejudged by the Forefaulture and Inability: And for their farther security, in case after the Decease of the Wife, the Children of the Forefaulted Person be surviving, and that any Right to the said Estate shall belong and accrue to His Majesty by their Inability, then and in that case, now as then, and then as now, he is to dipone to the Heirs of Tailzie succeeding after the Wife, and her Children, the said Estate, and any Right belonging to His Majesty, as being, or which shall then be in his hands by the Forefaulture and Inabilty foresaid.



*Queritur*, If a Bond granted to a Man and his Wife, and longest liver of them two in Conjunct-Fee, and to one of their Sons expressly named and the Heirs of his Body, which Failzieing to the Heirs to be procreat betwixt the Husband and his Wife; which Failzieing to the Wife her Heirs and Assignes; be Heretable or Moveable; Seing there is neither Infestment thereupon nor obligation to Infest? *Answer*. It is Heretable in respect of the Tailzie foresaid; there being no Tailzie of Moveables or Moveable Sums: And the provision in favours of Heirs Male, with the Substitution foresaid, is equivalent as if Executors were expressly excluded.

When a Person has settled his Estate upon a Friend, by a Disposition to him and certain Heirs of Tailzie therein mentioned; and thereafter for security of the Tailzie has taken a Bond from the person, in whose favours the Tailzie was made, that he should do no deed to disinherit the other Heirs of Tailzie; and to keep the Tailzie inviolable; *Queritur*, If the said person shall, without any Onerous Cause, Dispose the Lands or grant Bonds for great Sums equivalent to the value of the Estate, if the said Deeds may be questioned by the next Heir of Tailzie? *Retro Dubitandi*. The doer of the said Deeds was Fiar; and the Heir of Tailzie cannot come to the Estate, but as Heir to him, and is lyable to his Deeds. *Answer*. It is thought, in the said case, there is a *Fideicommissum* in favours of the Heirs of Tailzie: and though the Estate might be Disposed for Onerous Causes, the Disposer being Fiar; yet he ought not to have violate the said *Fideicommissum* by fraudulent and gratuitous Deeds. 2do. Besides the said *Fideicommissum*, there is a supervenient obligation, whereby the Heir of Tailzie is Creditor; and therefore may question any deed without an Onerous Cause in defraud of the said obligation: and an Heir, in whose favours there is obligations *qua* Heirs, may Question any Deeds done by the person whom he represents, contrare to the said obligation; As, *V. G.* when Deeds are done on Death-bed, or contrare to a Tailzie bearing Resolutive clauses, though for Onerous Causes; and much more in such a case, where a Bond is granted to the End foresaid, which ought to be effectual; and could operate nothing if the Heir could not question the same. *Earl of Caithness*.

A Person having provided his Estate, failzieing Heirs of his own Body, in favours of a Relation, and the Heirs of his Body, &c. and having by the Write bearing the said Tailzie, and a Procuratory of Resignation, provided that he should be Lyable to satisfy all Bonds, Obligements, and Deeds done, or to be done by him at any time during Life; *Queritur*, If these should be understood *civiliter*, dureing his *Liege poustie*, or of his natural Life? *Answer*. That it is thought, that it should be understood during his natural life; Seing the Entail being a free gift, any provisions therein contained in favours of the granter ought to be construed favourably: and the word *Lifetime* is properly to be understood of natural life.

If it be provided, that the said person should marry a Gentlewoman named in the Writ, *Queritur*, if such a provision be lawful, Seing it appears to be contrary to the Liberty that ought to be in Marriage? *Answer*. The Right being *sub modo*, he ought to fulfil the same: and there is no restraint as to his Liberty; Seing if he think fitt, he may choose to accept the Right with that quality, or not.

If the said Entail being made *in Leige poultie*, and resignation thereupon, the Granter may thereafter upon Death-bed, by a paper apart, oblige his said Heir of Tailzie to marry as said is, or to fulfil any other provision? *Answer.* It is thought, that seeing he is not so stated in the Right of Succession, that the Granter cannot prejudice him, who has still *voluntas ambulatoria*, and may evacuate the said Right being Master of it; and having it in his own hands and power; as he may cancel it, so he may qualify it as he thinks fit; & *qui potest plus potest minus*.

A person having, by an Infeftment holden of the King under the Great Seal, taken the Right of his Lands to himself, which failzieing to such a person as he should name by Writ, and his Heirs; which failzieing to certain other Heirs, did thereafter Dispose his Estate, failzieing Heirs of his own Body; to the person thereinmentioned and the Heirs Male of his Body; which failzieing to certain other Heirs of Tailzie; bearing a Procuratory of Resignation, and reserving the Resigners Liferent; whereupon Infeftment followed; *Quaritur*, If thereafter the Disposer should have Children of his own Body, what way should they be Infeft? *Cogitandum*.

If it should be thought, that the first Infeftment should stand in favours of the Disposers Heirs, the said last Disposition with what has followed thereupon being conditional, and the condition not having existed; *Quaritur*, If the Heir of the Disposers Body should thereafter decease, whether the said Right by Disposition shall revive, at least that the person foresaid in whose favours the Disposition is made, may be served Heir to the Disposers Heir of his Body, by vertue of the said first Infeftment, and the said Nomination and Disposition? *Sir Robert Hepburn.*

If the King grant a Charter, with the ordinary Clauses irritant for preserving of Families; and with that in special to be added, that it should not be lawful to any that should succeed to prejudice their Successors *Delinquendo*, even by committing of Treason; and if they be guilty of such Crimes, that the Estate shall be Forfault as to themselves, but not as to other Successors; whether such a Clause will secure against Forefaulture? *Ratio Dubitandi.* That it would be an encouragement to Disloyalty. *2do.* It is against the common Law, & *pactis privatorum non derogatur Juri communi.* *3tio.* By the late Act of Parliament anent Tailzies, it is provided, that the King should not be prejudged as to Fines nor Confiscations, nor Superiors of their Casualties: On the other part it is thought, there should be a difference betwixt these who by their vertue and purchase have founded a Family; and these who succeeded in the Right of Estates acquired by Loyal and Virtuous Persons: In the first case, it is just that the person who has purchast and Entailed his Estate with such Clauses, if he commit Treason, should Forefault for himself and all his Successors: In the other case, it is hard that a person descended of an ancient and loyal Family, should Forefault an Estate not acquired by himself in prejudice of the Family; and that the personal delinquence of one should weigh down the Merits of many Predecessors; A Family being like a Ship, out of which the *Jonas* that has raised the Storm should be cast, and not the Ship and whole Family perish: And upon the consideration foresaid, it has been provided for the standing of Families, even by Divine Law, that it should not be in the power of one to Ruine the Family, but the Successors

fors Right should revive by the *Jubile*: And by the Feudal Law in the beginning, *Feuda* were not *Hereditaria*, so as that the Heirs and Successors should be Forefaulted by the deed of their Predecessors: And when *Feuda* came to be *Hereditaria*, there were some that were *ex pacto & providentia*; so that the Succession was settled in such a manner, that it could not be cut off by the deed or Forefaulture of any of the Descendents, but as to their own interest; And there are yet Entails elsewhere, and in *England* of the nature foresaid, as *V. G.* of the *Lord Grayes* Estate; which was the occasion, that not only the Family, but himself was preserved; It being thought fitter, that his Liferent should be confiscat dureing his Life, than by his Death his Estate should go presently to his Brother. And as to that pretence, that Disloyalty would be thereby encouraged, it is of no moment; seing *qui sua vitæ est prodigus* will be *prodigus* as to all other interests: And albeit by the common Law, where there is no provision to the contrary, Estates are Forefaulted as to all intents; yet *provisio hominis tollit provisionem legis*; and there is no Law nor Statute, with us, disabling the King to give Rights with such provisions, as are consistent with, and suitable to the Divine Law, and even the Civil Law (*Fidei-commissa* being in effect Entails) and the Laws of other Nations, and of his other Kingdoms: and the *Brocard*, *pactis privatorum &c.* doth militate most, when the certain form and *modus habilis* is prescribed by Law for conveyances or Testaments, which ought to be precisely kept and observed without Derogation: In other cases *Provisio hominis*, as said is, *tollit legem*: As, by our Law, a Relict has a Terce of Lands, and a third of Moveables: and Marriage being dissolved within Year and Day the Tocher ought to return: and in case ward Lands, or the major part be Disposed they are recognised: and if a Feu-duty be not payed in the space of two Years, the Feu may be reduced; and yet as to these and many other cases *derogatur Juri communi pactis privatorum*. And as to the Act of Parliament concerning Tailzies, it doth militate only in the case of Tailzies with the ordinary Clauses irritant, anent the contracting of Debts, or doing other Deeds; so that albeit by the said Clauses irritant, the Debts or Deeds of the Contraveener are void, as to Tailzied Estates, yet Confiscations and Fines in favours of the King doe affect the Estate: and it is not provided, by the said Act of Parliament, that it should not be lawful for the King, upon the considerations foresaid, to grant a Right Entailed with the said Clause, that the Estate should not be forefault in prejudice of the Entail: and it cannot be said, that the concession of a Prince qualifying his own Grant with such Provisions as he think fit, is *Pactum privatorum*: and seing, other Superiors may so qualify the Infeftments and Rights granted by them to their Vassals, that the Vassal should not forefault his Lands, for Feudal Crimes; for selling the Lands holden Ward without the Superiors consent; or for being behind in payment of Feu-duties; it is against Law and Reason to deny that power to the King, to qualifie the Vassalls Right; so that, when Lands otherways would Forfault, they should not Forfault in prejudice of the Family and Successors.

The Lands of *Artloch* being by *Alexander Keith* of *Artloch* Hevetor thereof, Tailzied to himself, and the Heirs Male of his Body, which failzieing to the Heirs Female of his Body without division; which Failzieing to his Sister, &c. And having secured the Tailzie by Provision, that



it should not be in the power of any of the Heirs to alter the tamen, with Clauses irritant and resolute; whereby the contraveining of the Terms of the Tailzie are declared to be a ground of amitting the Estate, and devolving thereof upon the next Member of the Tailzie; All which Clauses are insert in the Bond of Tailzie, Charter, and Instrument of Seasin following thereupon.

*Anna Keith*, being the only Heir of the Marriage, and so Heretrix of the Lands; she by Contract of Marriage with *John Forbes of Assure* is obliged to resign and provide the saids Lands of *Artloch* to him and her in Conjoint-Fee and Liferent, and to the Heirs-Male to be procreat betwixt them; which failzieing to the Heirs-Male of her Body; which failzieing to the Eldest Heir Female to be procreat betwixt them; which failzieing to the Eldest Heir Female of her Body; which failzieing to him and the Heirs Male of his Body; which failzieing to the Eldest Heir Female of his Body: Which failzieing to him and his Heirs and Assignys whatsomever.

1. *Queritur*, Who is Fiar by the Conception of the Tailzie, whether the Wife, because she having been formerly Fiar, the Tailzie was made upon her Resignation, and so the Heirs of the Marriage must *in dubio* be Heirs to her? Or whether the Husband, by the Privilege of the Sex, and by the last termination of the Tailzie, which resolves on his Heirs (*ut supra*) will be Fiar? Or if the foresaid destination, whereby the Wifes Heirs-Male or Female are preferred to the Husbands in all the Branches of the Substitutions, will alter the case?

2. To whom the Heir of the Marriage could be served, whether to the Husband, or to the Wife?

3. *Hoc supposito*, that the Husband be Fiar; whether or not the foresaid Contract, whereby she puts the Husband and Heirs of the Marriage in Fee, will be interpret in Law prejudicial to the former Tailzie as a wronging thereof; Altho the Husband was expressly obliged to assume the Name and Arms of the Family, which compleats the design of all such Tailzies? And whether the Contract being in Minority will be reducible upon that ground?

4. Altho it might be reducible, as debording from the first Tailzie by making him and his Heirs absolute Fiar; yet if it may not stand in so far as concerns the Husband and the Heirs of his Body; and be only reducible, in swa far as it alters, and debords from the other Branches of the Tailzie?

### *Tailzie altered.*

A Minor having, contrare to the Clause irritant contained in his Fathers Tailzie, altered the Succession, and being Insest upon the Resignation: If the said last Right should be reduced, (*Vide Homologation Quæst. 2da, in litera H.*) *Queritur*, What way shall the Contraveener return to the former Right? And whether by the Decreet reductive, the former Right will revive, as if the posterior had never been? Or if the said person upon a Bill to the Lords must have a warrand to the Director of the Chancery for a New Seasin? Seing by the Resignation and Seasin following thereupon, there was *de facto* a Disseasin, & *quod factum est insestum fieri nequit*? Countess of Buccleugh.

*Teinds.*

**A** Person having Right both to Lands and Teinds, disponeth the Lands without mention or exception of Teinds; *Queritur* If the Teinds be disposed? *Ratio Dubitandi*, That the Right of Teinds is an inferior interest; and upon the matter a Servitude and burden upon the Lands; and is extinguished *confusione & consolidatione*, as soon as it is in the Person of the Heretor; as in the case of Servitudes, Right of Annualrents, &c. *Ennerpeffer* and *Bonsbun*.

A Person having acquired by Infestment, a Right to the Teinds of his own Lands, *Queritur*, If the Teinds be confounded with the Right of the Stock; that the Lands being thereafter disposed or comprised, without mention of Teinds; The Buyer or compriser will have Right to the same; as in the case of a Right of Annualrent?

*Queritur*, If a Person having a Right to Lands *cum decimis inclusis*, whether in that case the Buyer or compriser, without mention of the Teinds, will have Right to the same?

Seing the Brieve bears only a warrant to Enquire, *de Quibus terris & annuis Reditibus* the Defunct died *vestitus*, without mention of Teinds, *Queritur*, What way a Person being only Infest in Teinds, his Heir may be served special Heir to him in the same?

When Teinds are in Non-entry, *Queritur*, If the Superior will have Right to the haill profits before Declarator? Seing Teinds are not re-toured, and there is neither an old nor new Extent of the same.

*Teind of Fish.*

**B**oats for taking of fish, lying upon the shoar in one parish; and going thence and returning thither for taking and unloading; but belonging to Persons dwelling in another neighbouring Parish, *Queritur*. If the Teind of the fish should belong to the Minister of the Parish where they are taken, or where the Owners and fishers dwell?

*Proving the Tenor.*

**I**F a Comprising may be made up by proving the Tenor? *Answer*, It is thought, not? In respect, By the act of Parliament, the Tenor of Letters of Horning and Executions cannot be proven; and there is *Eadem Ratio* as to comprising: And a comprising is not of the nature of *Scripta & Instrumenta quæ possunt resciri*, being both of the nature of Executions and of a Decreet of the Messenger as Sheriff in that part: And neither Executions of Messengers, nor Decreets can be made up by proving the Tenor: And it is not enough that Witnesses may remember, and be positive that there was a Comprising; seing they cannot remember, at least ought not to be trusted, whether the comprising be formal; which being *Juris*, they can neither be Judges nor Witnesses thereto.

*Queritur*, If a Decreet for proving the Tenor can satisfy the Production in an Improbation? *Answer*, It is thought, it should not; no more than

a Transumpt: seing otherways the indirect manner may be cut off, which ariseth upon the comparing of hand Write, and other Circumstances from the Principal; which is not competent, when Extracts only of such Writs are produced: And the Style, that such Decreets should make alle great faith, as if the Writs were produced, is to be understood *Civiliter, viz. Except in causa falsi.*

If Sentences or Acts of Court being lost, the Tenor may be proven?

If Executions of Summons of Interruption being lost, may be made up by proving the Tenor, after the decease of the Messenger? *It is thought* that they cannot; Seing by the act of Parliament, the Tenor of Letters of Horning and Executions cannot be proven: And there is *Eadem Ratio* as to other executions made by Messengers; which appears to be that, viz That they are *Servi publici*; and by the Law only trusted and authorized as to such acts, and their relation of the same.

If the Tenor of Bonds may be proven? *Answer*, There is a difference berwixt Bonds and other Writs; in respect Bonds are granted, to the effect they may be satisfied, and retired upon satisfaction; and Debtors think themselves secure, when they retire and destroy their Bonds: And therefore when a Bond cannot be produced; *Instrumentum penes Debitorem*, or which cannot be shown, *Præsumitur Liberatum*; unless there be a clear Evidence that they could not be satisfied; as that the term of Payment was not come, or such like; and *Casus amissionis* be positively libelled and proven, as *incendii, rapinae*, or the like.

If a Comprising may be made up by proving the Tenor? *Answer*, It is thought not, for the Reasons foresaid, *Viz.* That it is both an Execution and Sentence; and the Tenor is so long when it is of so many Baronies, and it contains so many Essential Formalities, and Acts of Execution; and the Witnesses to many several Executions, that no person can declare that the Tenor libelled is exactly the true Tenor: and Comprising are of that nature, that they may be satisfied; and are deduced to the end they may be satisfied. *Lauderdale.*

### Decreets for proving the Tenor.

THE Tenor of a Writ being made up, *Queritur* If it will satisfy the Production in an Improbation, The Granter or his Representatives being called to the making up of the Tenor and Compearing? *Ratio Dubitandi*, That as to a Third Party who has interest to question the Writ being a Creditor, and having Comprised before the Decreet for proving, and there being a prior comprising upon the said bond; there is *Eadem Ratio* as in Extracts; Seing the means of Improbation in the indirect way is taken away. *vide Transumptis, Quest. i. hujus Literæ.*

### Terce.

A Person having disposed Lands *bona fide*, but being prevented by death before the Buyer was Infeft, *Queritur*, Whether the Relict will have right to a Terce? *Ratio Dubitandi*. The Relict has a Terce of all Lands wherein her Husband died infeft, and is not lyable to personal Creditors:

On



On the other Part, it seemeth against Reason, That the Husband having *bona fide* disposed, and the Heir being lyable for the Implement, the Relict should be in better case than the Heir, who has no part: and that the Relict should have only Right to a Terce of Lands undisposed: and that there is a difference betwixt a Disposition, and other Personal Debts; seing a Disposition is *Jus ad Rem*, which cannot be said of other Obligements. And these Words, That she should have Terce of all wherein the Husband died infest, ought to be understood *Civiliter*, *Viz.* undisposed.

*Queritur* (If Lands be redeemable) Will the Relict Terce have any part of the Money whereupon the Lands are redeemed, specially when the Husband died infest upon a Compriseing? *Ratio Dubitandi*, The Law gives unto Relicts only a Terce of Lands, and not of Sums of Money: and there is a difference betwixt a Terce, and a Liferenter who is provided to a Liferent of Lands under Wadset

A Person being obliged for a most onerous cause to dispoise his Lands and deceasing before Infestment or Resignation. *Queritur*, If his Relict will have a Terce, notwithstanding of the Disposition? *Ratio Dubitandi*, That it is hard, the Relict should be in better case than the Piar and Heir from whom the Lands may be evicted by a pursuit for implement: And though the Husband died Infest his Right was *resolubile*; and such as might have been evicted from him. 2do. A Reversion is but *passum de retrovendendo*, and in this case there is a full Vendition; and yet an order may be used upon a Reversion, which will either prevent the Terce or extinguish it.

*Queritur*, If a Reversion, though not Registrare, will militate against the Relict, to prevent her Terce or to Redeem? *Ratio Dubitandi*, She is not to be considered as a singular Successor, but as having a Right by virtue of, and as depending upon her Husbonds Right, yet standing in his Person; whereas he is demitted in favours of a singular Successor.

It is *Indubii Juris*, That the Husbonds Debts, that are only personal, do not prejudice a Relict of her Terce: But, *Queritur*, whether a Comprysing before her Husbonds decease will militate against her? And if as to this point, there be a Difference betwixt a comprysing whereupon the Superior is charged, and whereupon there is no charge?

*Queritur* If a Disposition, whereupon there is Resignation, will prejudice a Terce?

Lands being Wadset for a certain Sum, *Queritur*, If the Relict of the Creditor, will have a Terce both of the Lands; and in case of Redemption of the Sum of money?

If a Wadset be to a Husband only; and after his Decease to his Wife: And an order be used and declared; *Queritur*, If she will get a Terce of the money? And in that case, whether the Executors will not only have Right to the two parts but to the third part of the Sums consigned, with the burden of the Relicts Liferent? *Cogitandum*.

A Lady by her Contract of Marriage being provided to a Liferent; and infest bafe in satisfaction of her Terce, and what else she may pretend, *Queritur*, If the Superior questioning her Right as bafe, she may have recourse to a Terce, as renounced in behalf of the Husband and not of the Superior; and the Renunciation being *causa data incuitu* of her Liferent, he cannot debar her from the same; and take any advantage by the said Renunciation. *The Lady Ballencruff*.

*Quid*

*Quid Juris* as to a Tercer being Liferenter of a third part? *Answer.* The difference betwixt the Liferent and Terce is, That the Liferenters Right is anterior and certain, but the Terce is posterior and uncertain: So. that the Fiar may sell the Lands; in which case there would be no Terce. *vide Liferenter. qu: ultima.*

### *Territorium.*

*Territorium est universitas agrorum Jurisdictione munita, Jus Fluviat. p*  
42. num: 513.

### *Testament.*

**I**f a Testament may be Holograph?

If a Movable debt be due to an *English Man* who is deceased, must it be confirmed in *Scotland*; & *è Contra*?

If a Nuncupative Testament in *England*, will have Right to a Debt due in *Scotland*? *Ratio Dubitandi*, it is valid in *England*; & *mobilia non habent situm, & sequuntur personam*: on the other part, *corpora mobilia & nomina* though they have not *situm*, as Lands; yet they have it so far, as being *res Scoticæ*, they cannot be transmitted, but according to the Law of *Scotland*; Law being *rerum Domina*.

*Quid Juris*, if it be offered to be proven by the oath of the nearest of kin, that the Defunct did, before him, and other witnesses above exception, Name the pursuer his Executor and universal Legatar; will a nuncupative Testament so proven be sustained? *Answer*, It is thought, it will not; Seeing nuncupative Testaments are not in our Law admitted: And it is *de forma*, that they should be *in Scriptis*.

*Queritur*, If a Testament may be sustained by way of Instrument? *Answer.* an Instrument under a Notars hand, being but the assertion of a Notar, is not considered as *Scriptum*, which requires the Subscription of the party himself; or in *subsidiu* by Notars before Witnesses *de ejus mandato*.

*Queritur*, If one Notar subscribing for the Testator, be sufficient in Testaments? *Answer. Affirmative*; in respect of the great favour of last wills; and oftentimes there is not *copia Notariorum*.

Ministers by Act of Parliament cannot be Notars, but in the case of Testaments; *Queritur*, If *eo ipso* that they are Ministers they may be Notars in Testaments? Or if they must be admitted Notars? *Answer. Cogitandum.*

*Quæ Ratio*, That a Testament made in *France* or *Holland* according to the custom there, which is different from ours; should be sustained in *Scotland*, as to any Scots interest falling under the same?

If a Minor having Curators may dispose of his Estate by Testament, without the Curators consent?

A Minor of thirteen Years, or there about; having made a Testament, and named the person, with whom he was boarded and bred in Family, his Executor and universal Legatar; without the knowledge or consent of any of his Friends; *Queritur*, whether the said Testament may be

questioned upon Circumvention; without qualifying any other circumstance, but that it is *Dolus in re ipsa* to elicit from a person of that Age a Right to all his Moveable Estate in defraud of his friends? *Answer.* It is *Casus arbitrius*; and much will depend upon circumstances, if the Defunct had no Relation to the Executor; and if the Executor did suggest that the Defunct should make a Testament; and employed the Writer, and did inform the Writer, what the Tenor should be, and such like.

A Testament being made by a Sickly Child being *Pubes* but *in confinio* and a little time more; in favours of his Nurse, in whose house he had stayed for diverse Years, and lay sick for the time, whereby she was named Executrix and universal Legatrix; may be reduced as *inofficiosum & dolosum*; that being *dolus re ipsa* and *machinatio fraudulenta* to prejudice five of his Brethren and Sisters, who were in a poor Condition; in respect the Child had but lately passed Tutor and chosen Curators; and the said Testament was elicited from him without the knowledge of his Curators and other Friends, and the Writer and Witnesses were employed by the said Nurse; And the friends apprehending that she might take advantage, dealt with her, that the Child might be suffered to stay in another place; and she was not only satisfied for the time he had been with her, but they offered a Sum of Money to her, that he might be at freedom: And it is so incident to Minors to be influenced, that when they are to chuse Curators, the Council upon application will sequestrate them.

### Testament Execute.

IT appears that the Testament is Executed as to Debtors, by sentence against them; seeing after sentence an Executor may Assign: And therefore if the Executor die the Debt may be confirmed, and pursued for, by his Executors.

### Testament and the Wifes part.

A Wifes Testament being confirmed; and her Husband as best knowing having given up the Inventar, both of Goods and Debts due to and by him; and amongst the Goods, having given up the Wifes Jewels, and among the Debts due by him having given up Debts either simply Heretable, being upon an Investment, or Heretable *quoad relictam*, upon Bonds whereof the Term of payment is past; and so the *debita* being found to exceed *bona*, *Queritur*, What in Law the Commisars should do in such a case? *Answer.* The Wifes Jewels and Abulziements ought to be considered as *præcipua*, and not in Communion; and which ought not to be affected with the Debt: and it ought to be considered if any of the Debts be Moveable *quoad Relictam*, and these only ought to affect the Wifes part; so that what is free of the Inventar of the Husbands Goods will divide, if there were no Bairns *in familia*; and albeit there be Bairns but *foris familiat*, the half of the Husbands free Moveable Estate would be the Wifes part; and ought to be confirmed as belonging to her, with her whole Jewels and Abulziements. *Lauderdale.*

When the Husband survives the Wife, and her Testament is confirmed



ed; whether Moveable Heirship will be deduced, as when the Husbands Testament is confirmed? *Ratio Dubitandi*, There can be no Heirship, the Husband living: and on the other part, the Wifes Executry ought not to be in better case nor her self; if she had survived: and there can be no Bairns part, until the Husbands decease *acta*, albeit *habitu*: and there is *eadem ratio* as to Heirship.

*Nihil magis deberi hominibus quam ut ultima voluntatis sit liber stilus; & licitum, quod non redit, arbitrium; Leg. 1. Cod. de sacros Ecclef.*

*In Testamento Jure civili olim septem Testes requirebantur: Jure autem Canonico duo sufficiunt.*

*Si unus ex testibus fuit servus; ex benignitate, & ut voluntates ultimæ exitum habeant, Testamentum haud corrumpit, si eo tempore habitus fuit liber.*

*De rebus suis testari erat tanti momenti, atque ut fraudibus obviam iretur, ideo Jure veteri non nisi publice testamentum fieri permissum; & vel callatis Comitibus, quod semel in anno fiebat; vel si Testator erat miles in procinctu, cum parati essent cum hoste configere. Perez. lib. 2. tit. 10.*

*Legatarii aut fideicommissarii in re singulari & certa, possunt esse testes in Testamento; quia negotium censetur principaliter agi inter Testatorem & heredem. Ibid.*

*Testamentum nuncupativum maxime in usu esse; & si in scripturam a notario redigatur, esse tamen nuncupativum; quia scriptura ad memoriam non ad solennitatem adhibetur. Ibidem.*

*Filius-familias Testamentum condere non potest, quia in aliena potestate est: nec Testamentum ab eo conditum valet, si postea Pater-familias fuerit; quia principium inspicitur; & quod initio vitiosum est tracto temporis non convalescit. Idem. Institut. lib. 2. tit. 12.*

*Testamento novissimo rumpitur antequam, licet ex eo heres non adeat, quia additio non pertinet ad perfectionem Testamenti, sed ad ejus exitum tantum & effectum. Idem. lib. 2. tit. 17.*

*Si posteriore Testamento hæres institutus sit tantum ex parte, prius tamen rumpitur; & universitas hæreditatis ad eum pertinet Jure accrescendi, ne quis decedat partim testatus partim intestatus; perinde enim est, ac si partis mentio haud facta sit.*

*Irritum sit Testamentum, si capitis diminutionem Testator passus sit, non solum maximam & mediam, sed etiam minimam, Arrogatus forte: si vero tempore mortis sui Juris fuerit, convalescit Testamentum beneficio Prætoris; data secundum tabulas bonorum possessione hæredi scripto: sufficit enim fuisse sui Juris & Civem Romanum, tempore facti Testamenti & mortis. Ibid.*

*Si quis cœperit Testamentum facere nondum autem perfecit morte præventus, non infirmatur prius Testamentum; quia unumquodque eodem modo dissolvitur quo colligatum est. Ibid.*

*Quid si quis ista verba scripserit (addita etiam subscriptione) viz. se nolle Testamentum quod fecerit valere; Quæritur, an irritum fiat?*

*Testamentum Rescissum per Quærelam inofficiosi olim penitus corruebat; Jure vero novissimo tantum quoad institutionem; quia tantum peccatum est in liberis, non autem in legatis aut fideicommissis, quibus nulla injuria illata est. Perez. lib. 2. tit. 18.*

*Qui agnovit Testamentum quocunque modo, v. g. acceptando legatum suo nomine; caret Quærela: secus si Tutorio nomine aut alieno.*

*Testes*

## Testes.

THE Question being of the Jurisdiction of a Town ; If the Burgeses may be Witnesses ? *Hattoun contra Dundie.*

*Post didicita Testimonia alii Testes regulariter non recipiuntur; & si recipiantur, purgatur suspicio subornationis Juramento ejus qui vult alios producere; & ne claudicarent judicia, Idem conceditur adversario. Fritsch. Exercit: 2da. Juris public. n. 86.*

## Third and Teind.

WHEN Lands are set for Third and Teind, so that the Master is not to be payed by the Hand of the Tennent, or by the product of the Corns when they are Reaped and Threshen ; but has an Interest in the Corns and Bodies of the same, as the Tennent himself : Whether will his Executors have Right to the Third and Teind entirely, the Defunct dying before separation ; *eodem modo*, as if the Tennent who is *Partiarius* as to two parts, should die before separation ? *Ratio Dubitandi.* That there is no *Merces* or duty payable by the Tennent : he sows the ground for his own use, and for the use of the Master.

If the Wife should de cease after separation, whether in that case her Executor will have Right entirely to the Third and Teind ; seing they are *fructus percepti & in Bonis Mariti* ?

*Vide. Liferenter, Quæst. prima, in litera L.* which Question may be proposed as to Third and Teind.

## Titles of Honour.

IF there be *Feudum Comitatus* aut *Reguli*, and the same descend to Heirs Portioners ; *Quid Juris* as to the Title ?

When an Estate in Lands and Baronies, is erected in *Comitatum*, with the Title, whereupon Infestment follows ; *Quæritur*, If the Estate be Disposed or evicted by expired Comproysings, *Quid Juris* as to the Title ; seing it is not given by Patent, but by Infestment as *hereditamentum* and accessory to the Lands ?

A Patent of Honour being granted to a Person and his Heirs, *Quæritur*, if any of his Heirs may surrender the said Honour in the Kings Hands for a new Right to himself, and other Heirs than is in the former Patent, albeit he was not served Heir himself ? *Ratio Dubitandi.* He may sit in Parliament though he be not Heir : On the other part, though he be tolerate to sit in Parliament being Heir of Blood, and no person being concerned to object ; yet he cannot dispose of such an Interest, unless he be served ; seing Titles and Patents of Honour, are not *ex pacto & providentia & Gentilia* ; but are *Jura hereditaria*, belonging to these that first get them and their Heirs ; and may be Forefaulted.

A Title of Honour and *Jus Civitatis* being granted to the Receivers and their Heirs, *Quæritur*, If their Heirs owning and making use of the same, and not medleing or intending to medle with *bona Defuncti*, will be Ly-

able

able as behaving? *Ratio Dubitandi*. That such Interests and Capacities, are not *in bonis* nor *commercio*, and are *res inestimabiles*; and where persons are allowed *beneficium Inventarii* they cannot come under Inventar and be valued; and therefore there needs no other *Aditio*, but that they should owne the same; and Creditors are not prejudged, seing they are not the subject of Execution and Diligence: and yet they may be Forefault; these who have them for the time, being *quasi* Heirs of Provision.

When Lands are Erected in *Comitatum*, with the Dignity and Vote in Parliament, *Queritur*, If the whole Lands be Evicted or Disposed, what becometh of the Dignity annexed to the same? *Ratio Dubitandi*. That *Baronia* is *nomen dignitatis*, which is ever annexed to Lands; and that *Comitatus*, albeit a higher Dignity is of the same nature: and therefore as a Barony being sold, the Disposer does not retain the priviledges of a Baron; so it ought to be in the case of *Comitatus*; the Title being annexed to the Lands and given in consideration of the same, and of the Estate sufficient to sustain the Title: and that there is a difference betwixt a Title of Honour given by way of Patent, and that which is annexed to Lands. *Cogitandum*.

### Titular.

IF the Titular be in possession of Teinds, and die before *Michaelmas*; *Quid Juris*?

### Tocher.

IF either a Father or a Stranger be obliged to pay a Tocher, and Marriage do not follow; or be dissolved within Year and Day, *Queritur* To whom will the Tocher pertain? *Ratio Dubitandi*. All such Obligements are Conditional, and *causa data*: On the other part, it may be pretended, that there is *Fictio brevis manus*, and the same case as if the Tocher were given to the Woman, to the effect that she may give it to the person whom she is to Marry: so that though *Causa* cealeth as to him, it doth not cease as to the Woman, which ordinarily is Affection and Relation to her, and that she may be *Dotata*.

A Father having granted a Bond to his Daughter; and thereafter having by a Contract of Marriage with her Husband, given him a Tocher, without mention that it is in Satisfaction of that, or any other Provision; If notwithstanding it will be thought to be in Satisfaction? *Ratio Dubitandi*, That either the Father *cogitavit*, and remembered that he granted such a Bond, or did not remember; and if he did not remember, that which was not thought upon cannot be said to be intended to have been satisfied and taken away: and if he did remember, and yet did not provide, that the Tocher should be in satisfaction, it cannot be thought, that he intended that it should be so. *Lady Tester*.



*Quæstiones de Tractatu Suedico. & Bonis prohibitis, Vulgo Counterband.*

“ **U**bi exarsit bellum inter Reges Principes aut populos qui superiorem haud agnoscunt, quæ occasione belli ( ut plerumque fit ) exoritur controversiæ & quæstiones de navibus, rebus, aut hominibus in bello captis; Jure patrio, statutis aut moribus ejus gentis, cui actor aut capiens subditus est, haud judicandæ aut dirimendæ sunt; Reus enim, qui est extraneus, eas leges nec noscere præsumitur nec agnoscere tenerur; cum legibus & moribus ( qui eodem Jure censentur ) nulla sit nisi in subditos autoritas.

“ 2. Juris quidem gentium, in disceptationibus frequens est mentio; verum in libris nihil aut parum certi de eo proditum est; præter generalia & remota quædam principia; cum nullum sit Systema aut liber, nec esse possit, in quem omnes gentes consenserint; ut pro Jure gentium authentico, habendus sit.

“ 3. Inter omnes convenit, ubi duo Principes aut Populi bello committuntur; aliis Regibus, aut populis, qui isti bello haud implicantur & subditis suis, haud interdici aut minui libertatem commercii, cum istis Regibus aut populis inter quos bellum est; eo tamen temperamento & moderamine, ut neutri ex Adversariis, vel profit, vel obsit & noceat, in ordine ad bellum; quod plerumque fit vel opem ferendo, vel advehendo bona prohibita & vetita, vulgo *Counterband* dicta.

“ 4. Vocabulum istud *Counterband* innuit præviam prohibitionem: Bona igitur *Contraband* sunt, quæ contra Bannum seu Edictum advehuntur; & prohibita sunt vel Jure gentium, communi & notorio, vel speciali Banno; seu declaratione ejus principis qui bellum gerit,

“ 5. Jure gentium & belli, extra aleam est, ea bona esse *Contraband*, quæ per se & immediate ad bellum spectant, & eo destinata sunt, ut in bello vel offendant vel defendant; nec ullius aut exigui sunt in pace usus; ut Arma, cujuscunque demum generis sint.

“ 6. Quæ autem usus sunt ancipitis, tum in bello tum extra bellum, ut pecunia, commeatus & ejusmodi; Ita demum *Contraband* & vetita esse censentur, si hostis ad incitas & angustias redactus, & conditio ejus advehenti comperta sit, saltem eam scire potuerit; ut si oppidum sit obsessum; eo enim casu hostis est, qui hosti necessaria subministrat.

“ 7. Illa igitur bona, quæ communis ( ut ita dicam ) aut promiscui usus sunt, Jure gentium non sunt bona *Contraband* simpliciter, sed in casu prædicto tantum; sed nonnunquam, commeatus & bona prædicta, *Contraband* & vetita fiunt, etiam extra prædictum casum, & ab initio belli; si gerentes bellum, publica significatione ad alios populos edita ( quod in bello solenne est ) denunciaverint, se ejusmodi bona ad hostes advecta, pro vetitis & *Contraband* bonis, habituros.

“ 8. Verum eo casu distinguendum est, an cum populo aut principe, cujus subditi ejusmodi bona advehunt, Tractatus aut conventio intercesserit, de commercio etiam tempore belli: An vero nihil de commercio convenerit.

“ 9. Priori casu, cum tractatus ejusmodi sint contractus inter principes celebra-

“ celebrati, religiose observandi sunt; & secundum eos judicandum, etiam si princeps qui bellum gerit, denunciaverit commeatus & ejusmodi bona pro *Contraband* bonis habenda: Nec enim inconsulto aut Invito Rege aut principe, cum quo tractatus intercessit, ab eo recedere potest.

“ 10. Consequens est, licet ex stilo diplomatum seu Commissionum, quibus Magistri & Navarchi navium privatarum ( vulgo *Capers* ) muniti sunt; Commeatus & bona ejusmodi ( moribus nostris ) *Contraband* sint; Si tamen in nave *Suedica* deprehendantur ejusmodi bona libera, nec verita aut *Contraband* judicanda: expresso enim articulo Tractatus inter Regem nostrum & Regem *Sueciae*, commeatus & ejusmodi bona ut libera, impune ad hostes advehuntur.

“ 11. Quod attinet ad subditos Principis aut Populi, cum quo Tractatus aut Foedus de commercio non intervenit; Si bellum gerens, edito solenni ( ut moris est ) significaverit se ea bona pro veritis habiturum; & non obstante dicto Banno & edicto, subditi principis cum quo tractatus haud intercessit, ea bona advehant; pro veritis habenda sunt & Judicanda: Nec conqueri possunt, cum sint moniti & Inhibiti.

“ 12. Si vero in Edicto, seu declaratione ( ut loquimur ) nulla mentio fiat de commeatu, aut ejusmodi bonis; libera censenda sunt; etiam iis cum quibus tractatus aut foedus haud intercessit: Licet ex stilo nostro ( ut dictum est ) sint prohibita. Nec enim stilius nec mores nostri, exteris, quibus penitus ignoti sunt, obtrudi possunt: & cum nulla praecesserit denunciatio aut edictum publicum, ea bona prohibens; quod non prohibitum est permissum censetur: Et ex Jure belli & gentium, ad quod in ejusmodi casibus recurrendum est, libera esse Judicandum est.

“ 13. Ex tractatu *Suedico*, variae oriuntur quaestiones quas perstringere haud gravabimur. &

“ 14. *Quaeritur*, Si in nave *Suedica*, deprehendantur bona verita aut bona hostium, an in commissum cadant & confiscentur, tum bona ista prohibita; tum bona, si quae sint in nave, libera; & navis ipsa?

“ 15. Nullus est, quantum memini, in isto tractatu articulus, ex quo ad quaestionem istam responsio elici possit; Videtur tamen bona prohibita tantum confiscanda, salvis nave & bonis liberis; ea ratione, Quia ultimo tractatu inter Regem nostrum & Ordines provinciarum foederatarum cautum est; istiusmodi casu eveniente bona *Contraband* confiscanda; Naves autem *Bataavorum* & alia bona libera dimittenda; Et alio articulo ejus tractatus cautum est, Regem *Sueciae* & suos subditos, in eo Tractatu includi; In eo enim conciliando & promovendo, impigre operam navaverat.

“ 16. Nec obstat, quod tractatu isto nunc per bellum dissoluto, Articuli isti quoad omnes inanes videantur, & sublato principali corrui accessorium; Cum enim tractatus isti sint contractus inter Regem nostrum & Regem *Sueciae* & *Batavos*; qui ( quicquid fecerint *Batavi* ) quoad nos & *Suecos* illibati manent; nec subditis Regis *Sueciae*, *Bataavorum* culpa aut perfidia fraudi esse debet.

“ 17. Nec obstat, quod praeter tractatum istum pacis inter Regem nostrum & Ordines praedictos, eodem tempore articuli quidam commercii seorsum editi sunt; & inter eos, articulus de bonis veritis & eorum confiscatione; & licet convenerit inter partes, *Suecos* tractatu pacis comprehen-

“prehendi, de ijs tamen in articulo commercii nulla facta est mentio, *Ref-*  
 “*pondetur* enim articulos istos commercii eodem tempore additos, partem  
 “tractatus istius censendos esse.

“18. Quæritur, Cum tractatu *Suedico* cautum sit Naves *Suedicas* li-  
 “teris Salvi-conductus muniendas, forma solenni in dicto tractatu præscri-  
 “pta; An eo ipso quod literas salvi-conductus non exhibeant, capi &  
 “confiscari possint?

“19. Quæstio ista nupero bello excitata & sæpe agitata, nec tamen est  
 “decisa; nec desunt pro utraque parte argumenta: Cum enim isto tracta-  
 “tu libertas commercii ultro citroque sit permessa, tempore belli, sed sub  
 “modo, viz. ut fraudibus obviam eatur; si modus non observetur, liber-  
 “tas ista tollitur: ac cum ijs agendum, ac si libertas commercii cum hosti-  
 “bus penitus esset interdicta: Accedit, quod in tractatibus ejusmodi, om-  
 “nes articuli cum effectu intelligendi sint & ut aliquid operentur; nec ul-  
 “lus effectus erit articuli istius de salvis-conductibus, & de formula eorum  
 “tanto studio & industria concinnata, si naves ijs destitutæ ad hostes li-  
 “bere & impune commeari possint.

“20. Ex altera parte arguitur, isto tractatu haud caveri naves vel bo-  
 “na, periculo confiscationis subiacere, si literæ salvi-conductus vel desint,  
 “vel a formula ista recedant; pacta enim Commissoria esse stricti Juris, nec  
 “præsumi aut implicari nisi exprimantur; Nec articulum Inanem aut sine  
 “effectu futurum, cum enim effectum habere, viz. ubi navis munita est  
 “literis salvi-conductus dimittendam esse, nec ulterius inquirendum: Si  
 “vero literis istis munita non sit, in eam inquiri posse, an Bona verita vel  
 “hostium in ea sint; quod non sine gravi molestia & incommodo plerum-  
 “que fit: Et si vel hostes, vel hostium bona, vel bona verita in ea depræ-  
 “hendantur, tum demum abduci & addici posse.

“21. De quæstione ista, haud semel in foro ventilata, donec publicum  
 “per sententiam innotescat judicium; meum sustineo.

“22. Si aliæ adsint præsumptiones & adminicula, Veluti, si contractus  
 “nauticus ( vulgo *Charter-party* ) desideretur; si aliqui ex ministris  
 “nauticis, Præreta ( vulgo *Boatswain* ) & alii *Batavi* sint; si  
 “gentem suam, ubi primum navis obviam facta est, dissimularunt; & se  
 “*Bremenses* esse mentiti, sed postea religione Juramenti coacti, sese *Batavos*  
 “esse confessi sunt; Quod in facti specie evenisse compertum habeo; eo  
 “casu, si navis, literis salvi-conductus non sit munita, haud leve argumentum  
 “est navem & bona haud esse libera: Et adminicula ista, & similia cum  
 “eo concurrentia, in præsumptionem gravissimam & aggregatam, & uti  
 “ita dicam prægnantem assurgere videntur, nisi Rei luculentis probationi-  
 “bus & documentis ostenderint navem & bona libera esse, Nec ad hostes  
 “pertinere.

“23. Quoniam mentionem de *Batavis*, & hostium subditis fecimus,  
 “quæstio ista suboritur; Cum declaratione belli a Serenissimo nostro Rege  
 “edita, novissimo bello inter eum & Ordines prædictos, denunciatum sit;  
 “si in aliqua nave subditi hostium depræhendantur, tam bona quam na-  
 “vem confiscanda; nec tractatu *Suedico* ita cautum sit; In eo enim de  
 “Navarcho tantum cavetur, & permittitur cujuscunque sit gentis, etiam  
 “hostilis, modo sit Incola & civis regni *Sueciæ*: Si igitur, præter navarch-  
 “um, nautæ duo vel tres sint *Batavi*; quid eo casu censendum, An na-  
 “vis & bona addicenda sunt?



24. "Ex prædictis liquet, si vel bona vel subditi hostium in nave libera deprehendantur; bona vetita & hostilia, & subditos hostium detineri posse; navem autem & bona libera dimittenda.

25. "Verum difficilior est quaestio, *viz.* Cum tractatu *Suedico* tum subditi tum Inhabitantes & Incolæ Regni *Sueciæ* includantur, & fruantur libertate Commercii etiam cum hostibus Regis nostri; Si *Batavus* Inhabitans aut incola sit Regni *Sueciæ*, & vel ipse vel ipsius bona in nave *Suedica* deprehendantur, an Jure detineri possit, & bonis suis excidat?

26. "Cum *Batavus*, eo quod Incola est Regni *Sueciæ* pro tempore Jura Originis haud amittat, nec *Batavus* esse desinat. Qui Origine hostium est subditus pro hoste videtur habendus; Et si extra Regnum & ditionem ubi Incola est, in alto mari vel alibi deprehendatur, ut hostium subditus tractandus; præsertim si ipse vel sua bona ad hostes & cives suos, & terram ubi subditus est, advehantur.

27. "Hæc sententia istis rationibus videtur subnixæ; una a tractatu *Suedico*, quo cavetur adeo sollicitè de *Navarcho* licet sit hostium subditus, in favorem *Suecorum* & eorum Commercii, ut scilicet *Navarchum* adsciscere & præficere possint etiam hostium subditum, quia magis idoneus & suis civibus forte peritior est: Quod igitur, in uno articulo, nec sine cautela, ut *Navarchus* sit civis & Incola, permittitur, in alio casu prohiberi videtur, a contrario sensu: & quorsum tanta de *Navarcho* sollicitudo, si hostium subditus eo quod Incola & civis sit Regni *Sueciæ* pro tempore, libertate commercii cum civibus suis, licet Regi nostro hostibus, frui possit.

28. "Alia Argumenta sunt a gravissimo Incommodo: Quid enim si perduellis & subditus Regis nostri, Majestatis Reus & damnatus, in *Suecia* larem figat, & incola sit? An libertate commercii frui debeat, nec Regi aut subditis suis in mari deprehendere & ad supplicium abducere licebit?

29. "Quid si *Batavus* in Regno *Sueciæ* civium suorum Institor sit? An tam sibi quam constituentibus Regis nostri hostibus, ejus nomen & privilegium prætexentibus, quod incola sit Regni *Sueciæ*, libere & impunè, etiam cum hostibus negotiari licebit? An eo prætextu *Batavis* ad Regis nostri ditionem & Regna aditus & occasio commorandi & explorandi, summo Regis & Regni discrimine, permitteretur?

30. "Verum in quaestionibus de tractatibus & contractibus inter Reges & populos, amicitia & fœdere junctos, quarum occasione periculum est ne bello committantur; tutius est Regem ipsum consulere, & inquirere quid ejusmodi casu in Regno *Angliæ* obtineat; ubi quaestiones istæ frequentiores sunt; ne eodem bello ejusdem Regis tribunalia inter se diffideant.

31. "Quia in quaestionibus maritimis, de navibus & bonis bello captis, Magister, nautæ & vectores plerumque examinantur etiam Jurati: Queritur, An eorum dictis standum sit? Et si quæ sint contra reos præsumptiones, an eorum Juramento & Testimonio diluantur? Et videtur Respondendum, cum Juramentum sit finis omnis controversiæ, si vel ut partes vel ut testes considerentur, secundum eorum testimonia Judicandum, nisi vacillantia & suspecta sint, aut vitio aliquo laborent.

32. "Non pigebit attexere, Tractatibus prædictis non sine ratione cautum; cum naves privatæ bellicæ, non tam belligerandi quam caupo-

"nandi animo (ut *Ennius* dixit) instructæ fiat, nec tam ut hostem carpant quam sibi consulant, & sui compendii causa; ideo cautionem præstandam certam summam continentem in articulis expressam, ne fœderati aut eorum subditi quid detrimenti capiant; eam cautionem exigi debere, & quidem idoneam & summam istam continentem; nec sufficere cautionem indefinitam nulla summa expressa.

33. "Tractatu inter Regem nostrum & Ordines prædictos, quo Regem *Sueciæ* & ejus subditos includi dictum est, Cavetur lites & causas istas expedite terminandas; & si pro Reis sententia absolutoria lata sit, ab ea haud provocandum: Si vero secundum actorem Judicatum sit, Reis Provocationis remedium indulgendum, haud ad Judicem Ordinarium, verum ad Concilium Regis, aut ab eo delegatos: & Appellationis causam inter semestre tempus peragendam & finiendam.

34. "Quod iniqua & impar sit Rei & Actoris conditio; & huic denegatur, illi autem competat appellationis remedium; Id ea ratione videtur introductum, quod actori domi, & in suo foro de lucro certanti & agenti, haud metuendum sit, ne gratia aut potentia adversarii opprimatur: Quod autem provocetur non ad Judicem ordinarium sed ad Concilium aut delegatos; exteris & mercatoribus consultum est, ne longo sufflamine litium, & formularum, quæ in ordinariis Judiciis solennes sunt, Anfractibus attriti hæreant.

35. "Quod ea, quæ adeo pie consulta sunt, in usu haud sunt recepta; & ii quorum interest tantopere sibi defuerint, iis non utendo remediis, mirum videtur: Nec minus mirandum, consuetudinem a Jure & Ratio ne alienam tolerari; Ea autem est, quod cum exteris, quorum naves deprehensæ sunt, patronorum & peritorum copia haud deneganda sit, cujus consilio sese defendant, adeoque Admiralitatis curia, penes quam de iis causis jurisdictio est, *Lethæ* aut *Edinburgi* teneri debeat; Nonnulli tamen a *Thalassiarcha*, ut prætendunt delegati, in regionibus procul distitis, in causis istis plerumque arduis & gravissimis, per se & substitutos suos judicant; a quorum sententia, aliquando ad supremam, quæ *Lethæ* habetur curiam provocatur. Et ab istius curiæ sententia appellationis, rursus ad supremum Senatum & Dominos Sessionis (ut loquuntur) appellatur: Sic evenit, ut tot Judiciorum & curiarum meandros, vix detur eluctari: Nec id sine magno tum temporis tum sumptuum dispendio.

### *Posterity of Traitors.*

IF, by our Law, the Posterity of Traitors be disabled *ipso Jure*, both *Ante-nati* & *Post-nati*, as to any Estate pertaining to themselves, which is not proscriptitious from the Father after Treason? *Ratio Dubitandi*. The Doom of Forefaulture, beareth only forefaulture of Life, Lands, and Goods; without mention of the posterity; & *noxæ caput sequitur*: and *Lex Julia Majestatis* is but the municipal Law of the Romans, and is not authorised by any Act of Parliament or custom of ours. To Consider the *Act of Parliament* K. Ja. 5. and the Act of Dis-habilitation of the Posterity of the *Earl of Bothwell*, and Rehabilitation of *John Stewart*.

*Trans-*

*Transumps.*

**I**F Transumps under the Clerk Registers hand do Satisfy in Improbations? *Ratio Dubitandi*, as in the case of the Question, Decrets for proving the Tenor *in hac Litera T.*

If Transumps of Seafins out of the books of Touns and Burghs upon procefs to that effect, as use is, will satisfy the production? *Answer.* They will satisfy; seeing the Prothocalls are Extant in the Touns Register: *Cogitandum* as to the Transumps of other seafins.

*Trebellianica.*

**A**N Executor nominate, after Confirmation deceasing before the Testament be execute; *Quæritur*, will he have Right to the Third and *Trebellianica*?

*Trust.*

**W**Hether a bond in these terms, *viz.* bearing an obligment to denude and declaring the Trust, be equivalent to an Assignation?

*Trustees in Infestments.*

**A** Right being granted to one, his Heirs and Assigneys, for the use and behoof of another person and his Heirs, *Quæritur*, whether the casualties of Ward, Marriage &c. do fall by the decease, and with respect to the person infest, or to the person to whose behoof the Right is granted?

May the person, to whose use the same is granted, compell the Vassal to denude in his favours, without the Superiors consent?

Though the Superior may pretend, that when the Right is to the behoof of an Incorporation, that he has prejudice: yet if it be to the behoof of a single person, can he refuse to enter him, if the Vassal be content to denude in his favours? *Ratio Dubitandi.* Though *Usuaris* has an Interest, yet he is not Vassal; and the Superior cannot be urged to receive a new Vassal: And on the other part, the Right being in Trust and precarious, to the behoof of the other; *ex natura inest*, that he may revock and urge the Vassal to denude, and a Regress is implied, the Superior having granted the Right of the nature forelaid.

*A Trustee committing Treason.*

**A** Person having committed Treason, and having in his person for the time a Right to a bond by Assignation, but in trust to the use of another, and upon a back-bond declaring the Trust: *Quæritur*, Whether or not the Sum due by bond will belong to the King, and his Donator? *Ratio Dubitandi*, The Right of the Sum is in the person of the Traitor; and by the Back-Bond he is only debtor, and obliged to denude: And he



he to whose use it is intrusted has not *Jus in re* but *ad rem*; and a personal action against the Trustee, whereunto the King is not lyable.

### Tutors:

*Tutela* being *munus publicum*, at least *authoritate* though not *utilitate*; If by our custom a Tutor may be urged to accept the office? *Answer*, Negative; and yet he may be urged *Causative*, as v. g. If a legacy be left to a Tutor nominate, he must either accept the office or want the legacy.

If a Tutor of Law, after the year, compear to oppose the giving of a Dative; will he be heard to purge after *Jus Devolutum*?

As a Father has power to name Tutors; is he so Tutor of Law, that without any authority of the Judge or Service, he may Administrate and grant Discharges?

A Tutor nominate by a Codicill, ought he not to be confirmed; and the Nomination ly in the Commissars Register?

If where there is more Tutors, payment may be made securely to one?

*Quid Juris* as to Tutors, if they may be charged? and where there are Letters of Horning granted against them for their interest, upon the debt of the pupil, If their Escheat and Liferent will thereupon fall?

In what case Tutors may be charged, or pupils themselves? *It is Thought*, That *Cogitandum est*, Whether there be a difference betwixt the case of a Tutor, when there is a Decreet against the pupil and against him for payment, and he has not alledged nor made appear that he has nothing of the Pupils Estate in his hands, & *officium non debet esse damnosum*: And when the Tutor is only charged for his interest: Seing in the first case there is a decreet against him; and in the other, not: Or if he ought to Suspend as being Debitor *ex quasi contractu*; eo ipso that he is Tutor, and is lyable either to the debt, or ought to show that he cannot pay it.

*Queritur*, If a Woman may be Tutor dative, or Curator? *It is thought*, that (though the Testators will, be most to be followed in Testaments) she cannot be Tutor dative; because it is *virile officium*: And a Woman, though she will be Heir failzieing Children, & *penes quem emolumentum penes eundem onus*: yet she cannot be served Tutor of Law: And the Law not trusting her, she should not be Dative: And though the Exchequer gives such Tutories, it seemes to be an Errour and abuse.

If Breives for serving Tutors of Law should be direct to any others, but the Sheriffs? Or to other Judges, where the Defunct had his Domicile and his Estate? Seing Infants and Pupils have no Domicile: and Services are oftentimes of purpose before the Baillies of the *Canon-gate*; and in other places, where neither the Pupils parents did dwell, nor had they any interest or estate.

Diverse Tutors being named conjunctly, *Queritur*, if any of them de cease, will the Nomination be void? *Answer*, It is thought, that Tutors and Executors have the Office *singuli in solidum*; So that any of them de ceasing, the survivors continue *Jure non decrescendi*. *Montrose*.

A Mid-brother having left Children, *Queritur*, Whether will his Elder Brother or Younger be Tutor to them? *Ratio Dubitandi*, That the

the younger Brother will not succeed, & *penes quemonus, penes eundem emolumentum*: Et e contra, if the mid-Brothers Children should succeed to their Father, the younger Brother will be Heir to them, though not to their Father.

### *Tutor and administrator of Law.*

**Q**uaritur, If Debtors may pay the Father as Tutor of Law, *sine inquisitione*, and without some authority of the Judge competent? Seing there may be prejudice to the Pupil, if the Father be *prodigus*, or otherwise unfit.

### *Tutor Ratione Rei.*

**Q**uaritur, Whether a Person, Disponing his Estate to a Pupil or Minor, may appoint Tutors and Curators for administration of it during Minority? *Answer*, he may appoint Tutors or Curators to administrate: But the Question remaineth, whether he may appoint a Tutor, not only *rei suæ* but *Personæ*; and to any other Estate belonging to the Pupil.

**Q**uaritur, The Father being deceased, may the Grand-Father name Tutors to his Grand-Children?

There being no place to a Dative till after year and day, **Q**uaritur, If the nearest Agnat may oppose the giving a Dative? Or if *Jus* be fully *devolutum* to the King, as in other cases *Juris devoluti*?

### *Tutory.*

**F**ive Persons being named Tutors, whereof two to be *sine quibus non*, viz. The Defuncts Relict, and another; and the Relict being Married, and the other *sine quo non* deceasing: **Q**uaritur, Whether the Tutory falleth? And if it be void, whether the nearest of kin of age may be Tutor in Law? Or if there should be place to a Tutor Dative? And if in that case the surviving Tutors should be preferred to all others? *Ratio Dubitandi*, 1<sup>mo</sup>. Though the defunct did express his respect to the *sine quibus non*; so that during their being Tutors they should be *sine quibus non*; he did also express his confidence in the other Tutors above all others, by naming them Tutors; so that, for the reason foresaid, it may appear, That they should continue Tutors; at the least that for avoiding of question, they should be preferred to be Datives. 2<sup>do</sup>. The next nearest of Kin should not be Tutors, seing the Defunct did not trust them. The case of my Lord Montrose; his Father having named his Mother and the Earles of Perth and Haddington, Drumelzier and Sir Willaim Bruce, to be his Tutors.

## V.

*Re-entering of Vassals.*

**W**hen a Right holden of the Superior is reduced, whether the Superior be obliged to Re-enter without a Composition?

*Veſtigalia & Pedagia.*

*Veſtigalia & Pedagia sunt quasi stipendia Principum, pro protectione & reparatione itinerum & pontium instituta. Jus Fluviat. Tom. 2. Confil. 8. p. 140. n. 23.*

*Licet per vadum quis transire possit, solvitur tamen pedagium de fluminibus; &c. 24.*

*Vinco Vincentem.*

**Q**ueritur, In what case the Brocard holdeth, *Si vinco vincentem, vinco te?* Answer. *ubi est eadem Ratio*; as, v. g. If there be three compyrings, and the last compyrser be first infeſt; and thereafter the first; and the second in the last place; But there is an Inhibition at the instance of the second before the Debt of the third Compyrser: The second will be preferable to the third, who will be preferable to the first; and yet the first will be preferred to the second.

As in the case of Adjudication and Infeſtment thereupon, the adjudger may exclude the Superiors Ward falling by the Debitor, *Quæritur*, If he may exclude and be preferable to the Liferent, having the first Infeſtment; *Quia si vinco vincentem, vinco te?* Answer. he is not preferable to the Liferent: and the Brocard doth only militate *ubi est eadem Ratio vincendi*; and the adjudger *vincit* the Superior, because he is infeſt holden of him: so that there can be no Ward: but cannot upon that ground *vincere* the Liferenter, because she is also infeſt, and has a prior Infeſtment though base yet publick; and which therefore doth exclude the adjudgers Infeſtment being posterior; though it would not exclude the Superior as to his casualty, because base and not confirmed by him. *Ballencrief. vide Debitor and Creditor, Quæst. 3. Litera D.*

## U.

*Union.*

**T**Here being an Union in a Charter, of Lands in diverse Shires; so that one Seafin may be taken for all: *Quæritur*, If the Heir may be served in the Shire where Seafin is to be taken, as to all the Lands?

In



In respect the Lands in other Shires are *fictione juris*, and by reason of the Union, thought to be there: Or if there must be a Service by a Commission, or two Services in the several Shires?

If notwithstanding of the Union, Seafin may be taken of both the Lands, seeing the Charter bears that *una sasina erit sufficiens*, and not that it shall be necessary? And if the Seafin may be quarrelled, as not being at the places where Seafin is to be taken?

Item if the Taking two Seafins upon the Retour, will import a renouncing of the Union; so that a seafin cannot be taken thereafter at the place of the Union, upon Resignation or otherwise?

### *Universalia augmentum recipiunt.*

**T**otum est, vel Universale, vel Integrale: Universale ut hereditas, Dos, &c. augmentum & Diminutionem recipit, & futurum includit; Ita grege legato, quæ postea accedunt ad Legatarium pertinent: Jus. Fluviat p. 768, n. 12. & sequent.

### *Quando Universitas delinquit?*

**U**niversitas dicitur delinquere, quando secundum consuetudinem loci per præconem vel sonum campana, fuerit convocata, & in Concilio generali sponse convenerit & deliquerit.

Si Decuriones consenserint tantum, non Universitas sed particulares deliquisse dicuntur; quia aliud est Universitas, aliud singuli: & in generali potestate Decurionibus data, non includitur potestas delinquendi. Fritschii Tom. 2. exercit. 3. Juris publ. n. 73.

Licet ista solennitas contra civitatem sit probanda, tamen haud requiritur in delictis tractum successivum habentibus; v. g. si non puniunt delinquentes, quia ibi præsumitur ratificatio, quæ in pœnalibus mandato quoque comparatur; & consensus ipsius satis facto declaratur. ibid. n. 75.

Quomodo puniatur Universitas, vide ibid. n. 78. & sequent.

Punitur aliquando Banno, sumpto de authoribus supplicio; ut pœna ad paucos, metus ad omnes perveniat. ibid. n. 80.

## W.

### *Wadsets. Vide De Hypothecis.*

**W**HAT way shall a Creditor be secured as to a Wadset, or Money due thereupon? *Answer.* He may compryse the Wadset-Right; and if he cannot compryse, the term of payment of the Creditors Debt not being come, he may arrest the Sum due upon the Wadset, to be forthcoming in case of redemption. *vide Arrestment of Conditional Debt in litera A.*

If

If Another Creditor compryse the Wadset, will he be preferred to the Arrestor before the Order, though anterior? *Answer.* he will be preferred being in the Right the time of the Redemption; And the Money being only due to these who have Right to the Land, and must renounce and *retrovendere*.

The Wadsetter deceasing after an Order, and the Money being consigned *Queritur*, Whether will it belong to his Heir or Executor? *Ratio Dubitandi.* Money of it self is Moveable: And on the other part, *surrogatum sapit naturam surrogati*; and it is due to be given *ratione rei* and a renunciation to be given by the Heir.

*Quid Juris* in the case of a Contract, whereby Lands are sold and a price payable; if the Buyer charge for implement and consign the price, and the Disposer decease; whether will it belong to his Heirs or Executors?

After Redemption of a Wadset, or comprysing, the Wadsetter or comprysor dying; whether is it necessary that their Heirs be infest and renounce, or if a renunciation will be sufficient; the Wadset or comprysing being lousd and extinguished by Redemption?

### *Wadset Heretable or Moveable.*

**W**hen there is a provision in a Wadset-Right, that requisition should not louse the infestment: *Queritur*, If after requisition the Sum be Heretable or Moveable? *Ratio Dubitandi.* The Creditor declares his resolution to have the Sum: And on the other part, a Sum due upon a real Right appears to be Heretable. *It is thought*, that until it be actually uplifted, it should be Heretable: *sed Cogitandum.*

If the Wadsetter be year and Day at the Horn; and thereafter the Wadset be redeemed, *Queritur*, If the Superior will have the Wadsetters Life-rent of the Sum due upon the wadset.

If before Redemption, the Wadsetter Dispose the Lands, suppose they hold Ward, will they recognise simply, or only as to the Wadsetters interest? *Ratio Dubitandi.* The Wadset is, upon the matter, but a Hypothec; and he can forefault no more than he has: And on the other part, whatever paction be betwixt the Creditor and Debitor; yet as to the Superior, the Wadsetter is properly and formally his Vassal; so that *ex ejus persona* he has all the fruits and casualties of Superiority.

If a Wadsetter holding of the King commit Treason, Whether or not he forefaults the Lands or only his interest of Wadset? *Ratio Dubitandi.* As in the former Querie: and that the King should have *hominem vivum & mortalem confiscantem*; and all the casualties belonging to his Superiority, or to His Majesty as King, *ex morse vel delicto Vassalli*; and albeit the Right be redeemable, yet that is to be understood as long as the Right is in the person of the Wadsetter; but not after it is Extinct by Forefaulkure.

### *Wadset Proper.*

**I**f a Wadsetter of Ward-Lands die before Redemption, will the Marriage of his Heir fall? And if it fall, will the Debitor, if he redeem, be lyable to refound the avail.

In

In Proper Wadsets a great part of the Sum being paid; will the Wadsetter be comptable for the duties effeairand thereto?

### Ward.

**A** Compyrser of Lands holden Ward being infest, *Quæritur*, If these Lands will Ward by the decease of the compyrser, and if the Marriage of his appearand Heir will fall? *Ratio Dubitandi*, a compyrser is but an *interim* Vassal, for suretie of his Debt: And upon that consideration such a Right in England is considered as a *Chattel*, and not Inheritance. *vide* Compyrsing. *quæst*: 14. *litera*. C.

If the compyrsing be Redeemed, will the Debitor be lyable to refund the damnage sustained by the Ward and Marriage?

*Quæritur*, If the Ward of the compyrsers Heir will determine and expire upon the Redemption?

*Quid Juris* in the case of proper Wadsets; if the Debitor after Redemption, will be lyable to refund the foresaid Damnage? The difference being, that a compyrsing is an involuntar Right, and the Wadset voluntar; so that the Creditor seemeth to take his hazard.

A Creditor being infest in Ward Lands, upon a Wadset bearing backtack; will they Ward upon his decease, and the Minority of his Heir?

If they Ward, will the Debitor have the benefit of the backtack, during the Ward? The Superior having in effect consented thereto.

We have seen a Charter granted to the *Earl of Home*, viz. To *George Earl of Home* and *Mareon Halyburton*, of the *Earldome of Home*, and other Lands thereinmentioned; some of them holding Ward; Which Charter is granted to them in Liferent and to their Son *Alexander* in Fee; dated in Anno 1538. which bears, that though the said *Alexander* be infest in Fee, yet if the time of the Liferenters decease he be Minor, his Ward and Marriage shall fall to the King.

*Item*, It bears a reservation of Terce to the said *Mareon*, notwithstanding of the said Fee.

If the Ward of a person who is Appearand Heir, as to a Wadset Right, do not determine by a Redemption of the Wadset? And the same Question may be, as to the Liferent of the person infest upon the Wadset?

*Answer*. It is thought, that it will determine; his Right being *Jus resolvable*: And though the Ward be considered as *fructus Domini directi*; and being gifted, it may seem that the Donator cannot be prejudged, yet that is to be understood when the Vassal has an absolute Right; but not when the Right is qualified and *resolvable*.

If the Appearand Heir of VVard Lands being *pubes* and *Doli capax* commit Treason, will his VVard be determined? *vide* Marriage. *questiones* 17. & 18. *in litera*. M.

Lands holding VVard being full the time of the Vassals decease, by an Infestment upon a Compyrsing; but the Compyrsing being thereafter redeemed by the Debtors general Heir being Minor; *Quæritur*, If the Superior will have the VVard? *Answer*. It is thought, not; seeing the Heir does not succeed to the Lands as Heir to his Father, who was not Vassal; but as general Heir has Right to the Reversion, whereupon he has Redeemed; and *Modus & Forma* is much to be considered.



If the Compyring does extinguish, being satisfied by Intromission, *Quæritur*, If the Heir being Minor, there will be a Ward in that case? *Answer*. It is thought, not; Seing the Compyring does extinguish not *ab initio*, but *ex post facto*; and the Heir cannot be said to be the Apperand Heir of a Vassal; the Lands being full, as said is the time of his Fathers decease: And albeit there is not a formal and ordinar legal reversion, no Money being to be paid, yet there is upon the matter *Jus Retrahendi* to the Apperand Heir. *vide* Compyring. *Quæst.* 37. *litera C.*

### Ward Lands.

*Quæritur*, A Superior of Ward Lands having confirmed a base Infestment, whether will the Subvassal be Lyable to the Ward, or Non-entry falling by the decease of the Vassal? *Ratio Dubitandi*. Hope giveth only that reason in the case of Lands holden of the King, that Confirmations bear a *Salvo* of all Rights, Duties, and Services.

By the Act of Parliament The Superior during the Non-entry and Ward, had Right only to the Feu-duty due to the Vassal by the Subvassal; *Quæritur*, If the Superior be in the same case by the confirmation, as he was by the said Act of Parliament; notwithstanding the Act of Parliament 1606, in favours of Subjects Superiors of Ward Lands.

If the Apperand Heir of a Vassal of Ward Lands renounce to be Heir, will his Marriage notwithstanding fall either single or double? *Ratio Dubitandi*, he was never Vassal; and *exlibatus* is not *delictum*.

If Marriage be real and affects in prejudice of singular Successors? *Ratio Dubitandi*, Hope is for the Affirmative, and alledgeth Decisions. To consider *Haltons* case: On the other part, in *Novodamuses*, amongst incumberances that affect, there is no mention of Marriage. 2<sup>do</sup>. The Marriage respecteth not the Lands but the person, and his other Estate as to the value. 3<sup>io</sup>. It may appear to be a personal Prestation, whereto the person and his Right dureing his and his Heirs time is Lyable, but doth not affect a singular Successor, as in the case of Ward.

A Vassal of Lands holden Ward of the King did Feu the same before the Year 1633. when it was lawful to Feu Lands holden Ward of the King; and when the said Feu was granted, the Disponer did grant a general Discharge of the Feu-duty except dureing the Ward; and for securing the Feuer having bought the saids Lands as *optima maxima*, at also high a price as if the Lands had holden otherwayes, that he and his Successors should not be Lyable to the Feu-duty during the Ward; the Disponer was obliged to Infest the Feuer in an Annual rent out of other Lands equivalent to the Feu-duty; suspending always the effect of the said Right, except during the Ward. *Quæritur*. 1<sup>mo</sup>. If the said general Discharge, with an obligation to grant particular Discharges when required, will militate against singular Successors, being *in rem*? *Answer*. *Cogitandum*: But it is thought, that it will not; unless the same were by way of Provision in the Charter and Seasin.

When Ward Lands were Feued which did hold of the King before the Year 1633. The Feuer during the Ward was only Lyable to the Feu-duty by the old Act of Parliament, allowing the Feuing of such Lands; but

but there is no mention of the Marriage in the said Act of Parliament; *Queritur* therefore, Whether the Marriage of the Disposer and his Successors will affect such Feues? *It is Answered*, That it is thought, not; seeing the setting of Feus being allowed; it appears, that Feuers should be only Lyable to the Feu-duty.

The Feuer having ever posselt since the granting of the said Right (mentioned in the *Querie* abovementioned except one) but not being Infeft upon the said obligation to Infeft in an Annual rent, for relief of the Feu-duty: *Queritur*, If the Feuer should pursue upon the said obligation, if it may be obtruded that it is prescribed? *Ratio Dubitandi*, That the said obligation is a part of the Feuers Right; and the Feuer has been in possession by vertue of his Right all the time; and if the Feuer had not been Infeft upon the Feu-Charter, and had been in possession by the space of Fourty Years; and after the expiring of the same should pursue the Disposer and his Representatives, to grant a new Charter with a Precept to Infeft; it could not be pretended, that the said Right was prescribed.

If Lands holden Ward of the King be Feued after the Year 1633. and the King should question the said Feu as null, being contrar to the Act of Parliament: *Queritur*, If Prescription may be alledged and obtruded against the King? *Ratio Dubitandi*, That the Right is null *ab initio*, and cannot be a warrand and ground of Prescription; *Et quod nullum est, nullum sortitur Juris effectum*.

A Vassal of Ward Lands holden of the King, having Feued the same conform to the Act of Parliament warranting such Feus: *Queritur*, If the Vassal be Forefault, whether such Feus will fall under the Forefaulture; if they be not confirmed? Or if the Act of Parliament, warranting such Feus, be equivalent to a confirmation? *Answer*. It is thought, the King for himself and his Successors, by the said Act, did consent to all Feus that are to be granted by vertue thereof: So that the same is equivalent to a Confirmation. *Marques of Humilie*.

### Taxt Ward.

A Gift being granted of Wards simple or Taxt, falling within a certain time, *Queritur*, if the Donator will have Right to the Taxt Ward for Terms thereafter. *Answer*. He will have Right to the same; if the Taxt Ward has fallen within the said time, as the whole time of the Ward; seeing Ward is to be considered as *Jus integrum*; and *Dies cedit* when ever it falls, albeit *non venit*.

### Warrandice.

A Bond being Assigned with absolute Warrandice: *Queritur*, What is the import of the said Warrandice? And if the Cedent should be Lyable, if the Debtor be, or should become Insolvent? *Answer*. It will import only that the Debt is true, and due by a valide Bond; but not that the Cedent should be obliged to warrand the condition of the Debtor; the Law being exprefs to that purpose, that he should warrand *deberi*,

*deberi*, but not *Debitorem locupletum esse*. As was found in the case of Mr. Robert Barclay.

*Quid jaris*, If the Warrandice be in these Terms; that the Debtor, is *Locuples*, and he be truly so for the time; but he becomes Insolvent? *Cogitandum*.

### *Infestment of Warrandice.*

**I**F an Infestment of Warrandice, being only base, will be construed to be publick by Possession; by reason of the Possession of the Principal Lands? *Dumtaxat*.

*Waste*. **W**ASTE being committed by a Liferenter or Wadsetter; and the Hereafter for deceasing or disposing the Lands; whether will the Action for the same be competent to the Heir of the Heretor, or to his Executors, or Singular Successors? *Answer*. It is thought, it will belong to the Heir, or Singular Successor, being *Actia in Rem*. And so it is by the *Englifo Law*.

### *Witnesses Remitted.*

**T**HE necessary Qualification of a Witness being Honesty and Integrity, which though presumed in all Persons, yet cannot be thought to have been in these, who by sentence on their own Confession, are evidently *Criminosi*, and guilty of the highest Crimes: It would seem that a Remission may Free as to punishment, and may Repone as to all other capacities, and as to the Kings own Interest; But not as to that, which in behalf of the People, requires Integrity: And the King by a Remission may free a Pain, but not a Guilt, and cannot repone to Innocency.

### *Witnesses in case of Treason.*

**T**HE Law of the Majesty, and the Statutes of King William Chap. 11th. Of these who are *Infamous*; and the Statutes of Robert the 1st. Cap. 34. of these who are repelled from Testimony, are clear, that *Socii Criminis* cannot be Witnesses, and *convicti & redempti* cannot be Witnesses: *Quaritur* therefore, if a Person convict of Treason and Remitted, that he may be Witness against others, can be Witness? Especially, that Law bearing That *conducti prece vel pretia* cannot be Witnesses; and there can be no greater *pretium* than a Mans Life, Skin for Skin &c.

### *Women Witnesses.*

**Q**Uaritur, If Women Witnesses may be admitted in the case of Divorce, to prove Adultery? *Answer*. This Question is under debate, upon



upon Advocation from the *Commissars of Edinburgh* having admitted the same: And that they should not be admitted. *imo.* That by our Law, *Cap. 34. Stat. 2d. Ro. 1st.* Women are not Habile Witnesses: And by the Custom (except in *casu puerperii* to prove the Birth of Children, to give the Husband the benefite of Courtesie) and by the *Canon Law Decretal: De verborum significatione Cap. 10.* And on the other part, it is urged, by the Civil Law, they may be Witnesses except in Testaments; and by the Canon Law, they may be Witnesses in *causa Matrimoniali*, and by our custom in *Criminibus occultis & domesticis*; and in *atrocioribus*, as Murder, Treason, and Falsehood: And in Answer, It is urged, that where the Civil Law is altered by the Canon, that is to be followed; and that Women cannot prove Marriage, and ought not to prove the Dissolution; and in *causa Matrimonii* Witnesses should be above all exception. *Cap. 1. de Consanguinitate*: And if any of the Canonists were of another Opinion, it was because the effect of Divorce was *separatio mensæ & Thori, non vinculi*; and in Treason and such Crimes much is indulged, *ad vindictam publicam*, but not *ad vindictam privatam*, when such pursuities are only for private interest: And it is not presumed, that the Kings Advocat will corrupt Witnesses: and in whatever case either by the Canon Law or ours, Women are admitted, It is only *ubi constat de corpore delicti*, which is not in Adultery, where there is not a Child: and in whatever case (even when the publick is concerned) Women are never admitted, but to adminiculate; And *Quando concurrat unus testis habilis, supplet inhabilitatem alterius*: And there being Forty or Fifty Processes of Adultery within this Hundred Years, Women Witnesses were never received: and they are not admitted in *causa scandali* before the Commissars, to prove *injuria verborum*, much less in *Crimine Adulterii*.

### Obligements to employ Sums of Money, for Provision of Wives.

IF a Person be obliged by Contract of Marriage to employ a Sum of Money to himself and his Wife the longest liver in Liferent, and to his Heirs *Quaritur*, If the said obligation be not performed, what course the Relict may take to affect thereupon his Estate having no Heirs, Creditors being in competition of Diligence? And if she may not pursue his Appendant Heir as lawfully charged, making mention of the Obligation, and that the Heir will not perform the same, and that *loco facti succedit interesse*; and therefore to hear and see him decerned to pay and make forthcoming to her the said Sum, that it may be employed conform to the said Obligation; and to hear and see it found and declared, that the same Execution shall follow upon the Decreet by Adjudication or otherwayes, as is competent to other Creditors?

If a Relict will be preferable to other Creditors?

### A Womans Jointure.

A Man getting a Tocher, and giving a Joynture in order to his Wife's Aliment; and she having a Joint Right with him: If he become

Bankrupt will it be altogether ineffectual during Life? *Ratio Dubitandi.* It is Alimentary, and she is a most favourable Creditor, and otherways it should be *Societas Leonina.*

### Woods.

**W**hen a Liferenter is Infeft *cum Nemoribus*: *Queritur, Quid Juris,* VVhen the VVood falleth to be cut during the Liferent?

### Wrack.

**I**F Ships or Barges belonging to this Kingdom, do make Ship-wrack within the same: *Queritur,* VVhether the Representatives of the owners may claim the Goods and not the King? Or any Infeft *cum Wrack*? *Ratio Dubitandi,* That by the Act of Parliament, *Ja. 6. Par. 9. Cap. 124.* Ships belonging to these Nations, where that Law has not place, are to be in another case than the Ships belonging to the Nations where the Law anent Ship-wrack has place: and it seems reasonable, that the King's own Subjects and their Ships should be in as good case, as the Ships of any Nation whatsoever; and that their Ships and Goods should not be lost upon pretence of VVrack; unless there were a positive Law to that purpose: and the foresaid Act implies, that it is *Triste Lucrum*, and not to be owned but *Lege Tulsionis.*

### Z.

*The case of the Admiralty of Orknay and Zetland, Represented in behalf of the King, in Answer to the Duke of Lennox's Claim thereto.*

**B**Y a Charter under the Great Seal in anno 1603. His Majesties Grandfather did give and grant to Lodovick Duke of Lennox the Office of Admiralty, in these terms, *Totum & integrum Officiam Admiraltatis nostri Regni, cum omnibus privilegiis honoribus & Commoditatibus eidem spectantibus.*

The said Charter is not only of the said Office, But of the Dukedome of Lennox, and of the Lands thereinmentioned belonging to the same: And as to the said Lands and Dukedome, the said Charter is upon the Dukes Resignation, the same having formerly pertained to him; But as to the said Office of Admiralty, the same is not given upon the Dukes Resignation, but is casten in in the *Novodamus*; whereas the Clauses of *Novodamus* do not usually contain, as to the Subject Disposed, more nor did formerly belong to the Resigner; seing *de novo dare & renovare* doth suppose a former and preexistent Right. There are indeed Ratifications in Parliament of Lodovick Duke of Lennox his Right of the Office of the Admiralty; But it is to be considered, that by ancient Laws and Acts of Parliament, it is Statute that heretable Offices should not be given, or Disposed in Fee or Heretage; and if they should *de facto* be disposed, they should be given with great deliberation, and deliverance of the Parliament, s appears by the Acts 43 and 44 King James 6th. his 11th. Parliament.

Ratifications do ordinarily pass in Parliament, of course without voting, the very last hour of the Parliament when it is to dissolve; and how little weight should be laid upon the same, it appears by the Ratification produced for his Grace the Duke of *Lennox* dated 23 of *October* 1612, which doth ratifie the Infestment Granted to the said *Lodovick* Duke of *Lennox* of the Offices of Great Admiral of *Scotland*, and of all the Isles and bounds thereof, with the Offices of Lieutenendrie upon the seas, and Collonellship, and Justice General, and Office of Judicatorie Criminal and Civil, with all the Priviledges, Dignities, and Casualties of the same set down in the said Infestment; albeit no such Infestment, for any thing known, is or can be produced: and the foresaid Infestment in the year 1603 Granted to the Duke of *Lennox* is only simple, of the Office of Admirallitie *Regni nostri* without any mention of the Isles, or of the Office of Lieutenendrie upon the Seas or Collonellship, and Justice General, and of the Office Judicatorie Criminal and Civil; And the said Act of Parliament is blank as to the date of the Infestment which is ratified; whereas if there had been any such Infestment of the Tenor and Extent foresaid, it would have then been produced the tyme of the said ratification; And if it had been then produced, the ratification would have expressed the date of the same.

It Appears by certain other papers now produced by the Duke for clearing his interest, That the claim of that Honourable Familie was only of the Office of Admirallitie of the Kingdom, without any mention of the Isles, and much less of *Orkney* and *Zetland*; in so far as his Majesties Fathers letter 16 *June* 1628, of which the extract is produced, doth bear, That he had been pleased to sign a signature, In favours of the Duke of *Lennox* of the Heretable Office of Admirallitie of this his Kingdom: And in the Act of Parliament produced of the date 28 *June* 1633, Mention is made, that the deceased *James* Duke *Lennox* stood Infest as Heir to the said *Lodovick* Duke of *Lennox*, in the Office of Admirallitie of this Kingdom, without the least mention of *Orkney* and *Zetland*.

It appears by the Writs produced for the Duke, That until the Earle of *Mortouns* Grand-Father obtained a gift and Right of *Orkney* and *Zetland* from his Majesties Father; The Duke of *Lennox*'s Right, as to the admirallitie of *Orkney* and *Zetland*, was ever questioned and controverted by his Majesties Officers; In so far, that upon the last of *March* 1628, The King did set a Tack of the Earldome of *Orkney* and *Zetland* To *Archibald* Lord *Naper*, Containing a Right likwayes of the Admirallitie within the Bounds of *Orkney* and *Zetland*: And the Earle of *Linlithgow* having appeared in behalf of the Deceased *James* Duke *Lennox*, The said Lord *Naper* Declaired, that he should be ruled as to the said Right of Admirality according as his Majestie should declare his will thereanent; whereas if the Dukes Right had been clear and unquestionable, neither a Tack would have been set of the Admirallitie of *Orkney* and *Zetland*, neither would there have been any Reference made to his Majestie; But upon the Earle of *Linlithgow*'s appearing, and representation of the Dukes Right, the Clause of the said Tack as to the Admirallitie of *Orkney* and *Zetland*, would have been Delet.

As to Possession; the Earles of *Mortoun* have been in Possession of the Admirallitie of *Orkney*, upon a Gift and Right from his Majesty, ever since the Earle of *Mortouns* Grand-Father obtained the Right of *Orkney*.



There is produced for the Duke, The double of a Gift granted to the Earl of *Linlithgow* of the Admiraltie of the whole Kingdom of *Scotland* and *Isles* thereof, and of the Lieutenendrie, Justiciarie and General of the Sea; with consent of the Deceast *James Duke of Lennox* and of his Curatorsf the said Earl being a Confident Person and Relation of the said Noble Familie, And without prejudice of the Dukes Right: But it is to be Considered, that the said Paper is only a Double and not Authentick, And the said Right is only Granted during the Minoritie of the said Duke of *Lennox*, and is given upon a Supposition and Narrative of the Dukes Right; Whereas no Right has been, or for any thing that can be seen, can be shoven; That the Dukes of *Lennox* have Right exprefely of the Admiralty of the *Isles*, and of the offices of Lieutenendrie and Justiciarie.

As to the Priviledges and Casualties belonging to the Admiraltie of *Orknay* and *Zetland*; it is represented, that the Priviledges and Casualties of the Admiraltie are not specified nor defyned in any Charter or Record, for any thing that does appear: the Charter foresaid granted to *Lodovick Duke of Lennox* in Anno. 1603, bearing only (as said is) *Cum Privilegijs & commoditatibus eisdem Spectantibus*: And the Charter granted to *Adam Hepburn* Earl of *Bothwell* in the Year 1511 (which is the most ancient Record of Admiraltie that we have seen) bearing only the said Office of Admiral *Totius Regni*, to be given to the said *Adam*, *Cum omnibus Libertatibus proficuis & eschetis ejusdem*; without mention of the *Isles* of *Orknay* or *Zetland*, or specifying the Liberties and Casualties belonging to the Admiralty.

It Appears by an Act of Parliament Intituled *concerning certain abuses of the Admirals proceedings*, being 156. Act of King *James 6th.* his 12. Parliament; that upon pretence of an Infeftment granted to *Francis* Earl of *Bothwell* of the Admiraltie of *Scotland*, containing greater Specialities and diverse Clauses which were not in the former Infeftments of Admiralty, The People being oppressed did Complain, and by the said Act it is Statute, that the Admiral and his Successors should exerce no Jurisdiction nor exact no Dutie nor Casualtie, But that which was in use to be exercised and taken by the Admiral for the tyme, before the Death of King *James 5th*: And therefore it is humbly conceived, that whosoever shall be found to have Right to the Admiraltie of *Orknay* and *Zetland*, It is fit that the Priviledges and Casualties of the same, be so defyned and cleared, that the Fishing, Trade, and Traffique be not interrupted nor disturbed; And that his Maiefty be not prejudged of his Rents of *Orknay*.

It is humbly represented to his Majesties Consideration, The Records being for the most part lost, which might have cleared his Majesties Interest; and the Right of Admiraltie being Granted to the Dukes of *Lennox* in manner foresaid; and neither the Dukes Right nor the Right of Admiraltie granted to the preceeding Admirals being special as to the *Isles* of *Orknay* and *Zetland*; and the said *Isles* of *Orknay* being the Kings Propertie, and feued only to the Earles of *Orknay*, and now Annexed to the Crown; and the said *Isles* being so remote and of so vast an extent, and formerlie possessed by the King of *Denmark*; and upon Transactions with the said King which are not very ancient, being reunited to this Kingdom; Whether or not the Right of Admiraltie granted to the Dukes of *Lennox* ought to be extended to the said *Isles* of *Orknay* and *Zetland*?

F I N I S.

The DE-

THE  
DECISIONS  
OF THE  
LORDS  
OF  
COUNCIL and SESSION,  
IN

Most Cases of Importance, Debated, and brought before  
them; from *December 1665*, to *June 1677*.

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OBSERVED  
By Sir *JOHN NISBET* of *Dirleton*,  
Advocate to King *CHARLES II*.

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To which is Added,  
An *INDEX*, For finding the principal Matters in  
the said *Decisions*; As also, A List of the  
Pursuers and Defenders Names.

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EDINBURGH,

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THE  
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LORDS  
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COUNCIL AND SESSION

AND OF THE  
JUDGES OF THE  
COMMONS

IN THE  
MATTER OF THE  
PETITION OF  
THE

TO WHICH IS  
ADDED

A  
LIST OF THE  
CASES  
AND  
MATTERS  
DURING THE  
REIGN OF  
HIS MAJESTY  
GEORGE THE THIRD



Printed by G. G. & J. W. JOHNSON, in the Strand, near St. Dunstons Church, in the City of London.



C O

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# DECISIONS OF THE LORDS OF

COUNCIL and SESSION,  
In some Weighty and Important  
Affairs before them.

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Beginning the 7. of December 1665, and ending the 29. of June 1677.

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Decision 1st. *Veatch contra Duncan, 7. December 1665.*

**T**HE Clause *cum molendinis & muluris*, importeth freedom from affriction, though it be only in the *Tenendas. Me respo-*  
*tente.*

D. 2. *Burnet contra Leys, 12. Decemb. 1665.*

**T**He said Mr. *Robert Burnet* Son to *Alexander Burnet* of *Leys* being provided by his Grand-Father Sir *Thomas Burnet* of *Leys* (his Father having deceased before) To the Sum of 10000. Merks, to be payed after his age of 25. Years; with Annualrent after that time conform to a bond; pursued his Nephew *Leys* for the Annualrent of that Sum; at least for an Aliment until he should attain to that age: Upon that ground, That he could not starve; and that his Grand-Father, whom the Defender represents as Heir having provided him, as said is, to the foresaid Sum to be payed at the time foresaid, did acknowledge that he was obliged to provide

vide him being his Grand-Child : and that until the time his provision should be payable, he and his Heirs were lyable to his Entertainment being *Debitum Naturale*.

The ~~Lords~~ this day did Demurre: And the case being of consequence as to the preparative, thought fit it should be further thought upon.

D. 3. *Ferguson contra More. Eodem die.*

**I**N the case *Ferguson contra More*, the Lords Found That Compensation should not be granted against an Assignee upon a Debt of the cedent Assigned to the Suspenders; unless intimation had been made to the Cedent, before the Chargers intimation of the Assignment made to him by the Cedent.

D. 4. *Inter Eosdem, eod. die.*

**I**N the same case, two Persons being obliged Conjunctly and severally as principal Debtors, to pay a Tocher, without a clause of relief *pro rata*, It was found that *de Jure inest*.

D. 5. *Pringle contra Cranston. eod. die.*

**I**N the case *Pringle of Greenknow contra Cranston*, Found that a subvassal being infeft by a Baron *cum Curis & Bloodwitis*, may hold Courts and unlaw for Blood.

D. 6. *Eleis contra Keith and Wifcheart, 15. Decemb. 1665.*

**I**N the case betwixt Mr John Eleis and Mr Alexander Keith and Wifcheart, It was Found That Elizabeth Keith Spouse to Mr William Wifcheart Minister at Leith, having by Bond, granted by her Husband and her, obliged her self to pay to the said Mr. John, the Sum of 6000. merks: and for his further suretie to infeft him in certain Lands pertaining to her; which bond contained a procuratory of resignation: The said bond though null as to the obligation to pay the said Sum, was vake as to the Right of the Lands: And that the said Elizabeth, having thereafter disposed the said Lands in defiance and prejudice of the said Mr John, was lyable to the said Mr John, and upon that ground, The Lords found the said Mr John as Creditor to the said Elizabeth, might question any fraudulent Rights made by her to his prejudice.

D. 7. *Grants and Row contra Visc. of Stormont, eod. die.*

**D**avid Viscount of Stormont having obtained a Decree of Reduction against Grants, of their Right of certain Lands, for non production. Grants and Row, did reduce the said Decree against Grants and Row, upon production of the Rights called for in the first Decree: And in this Reduction, The Lords did suffer and admit the said Viscount to insist in the said first Reduction, he producing the said David Viscount of Stormont his Right and instructing that he represents him; Though the said first Process was not transferred in the

the Person of the said *Viscount active*; and against the Pursuers of this Reduction *passive*; and the summons of Reduction, whereupon the first Decreet, proceeded was not produced: Which *The Lords* allowed to be supplied by production of the Decreet, and a paper containing such reasons of Reduction, as *Stormont* thought fit to give in: And that in respect it was the fault of the Defenders in the first Reduction, that the Writs were not then produced: And they and these having Right from them being reponed, it was just that *Stormont* and his Heirs should be likewise reponed.

D. 8. *McLeod contra Young.* 19. Decemb. 1665.

**W** *Alter Young, Harie Hope* and *McDonald*, that they had commissioned *Donaldson* to buy Cows for their use; and that for such as should be bought from him they obliged themselves to pay all such Bills as should be drawn upon them: and the said *Donaldson* having drawn a Bill upon the saids Persons and any of them: *Found*, that in respect they were partners and *socii* as to the bargain; and the Lord *McDonald* had upon their letter trusted and sold the Cows to the said *Donaldson*, they ought to be lyable *in solidum* conjunctly and severally.

D. 9. *Dickson contra Sandilands.* 21. Decemb. 1665.

**I**N the case betwixt *Dickson of Killoch* and *Sandilands* his Mother and her present Husband: It was *Found*, that a Husband being obliged by Contract of Marriage, to provide the liferent of such Lands as he should acquire during the Marriage, to his Wife in liferent; and to the Heirs of the Marriage: and his Heir being pursued for implement, and for resigning certain Lands acquired by the Husband for a liferent to the Relict; The Relict her liferent and Right should be with the burden of a Sum of Money borrowed by the Husband, for making the said purchas; as to the Annualrent of the said Debt during the Relicts Lifetime.

*The Lords* considered, that though, in order to other ends and effects, and in special to determine the Succession in favours of an Heir of conquest, whatever Lands are acquired by any person *titulo singulari* are esteemed Conquest: yet in Contracts of Marriage such obligations anent conquest, are to be understood of what is acquired by the Husband with his own means and Moneys; seeing what is acquired otherwayes (the Price or a part of it being borrowed, and the Husband being Debitor for the same) upon the matter, and in effect, is not conquest and a free accession to the Husbonds Estate; in so far as the Price is a burden upon the Husbonds Estate: and as the Husband, if he had been charged himself, might have satisfied the obligation by giving an Infestment with the foresaid burden, so the Heir may do the same.

D. 10. *Lepar contra Burnet.* 23. Decemb. 1665.

**I**N the case betwixt *Lepar* and *Dam Rachel Burnet* and the *Laird of Prestoun* her present Husband; these questions were agitated and decided.

1. If a Husband get, in Tocher with his Wife being an Heretrix;  
B b b b mor.



more than an ordinary and competent Tocher, which he might have gotten with another; The Husband and his Heirs will be lyable, after the Marriage is dissolved by the Wifes decease, *in quantum lucratus est*, for the Wifes Debt: And the *lucrum* will be considered, to be the benefit he has gotten above an ordinary Tocher.

2. The Lords inclined to think, That though a decreet of registration was obtained against the Wife and her Husband for his interest; The Husband will not be lyable, the Marriage and his interest ceasing: And that an ordinary Tocher being *ad sustinenda onera*, is not *lucrum*.

3. Heirs portioners are lyable for their own part; reserving action in case any of them become irresponsal: and if the Creditor having done diligence cannot recover their parts, he may have recourse against the rest.

4. It was moved ( but not decided ) whether the others being *non solvent*, The responsal Heir should be lyable for their proportion *in solidum*? Or only for What he has gotten of the defuncts Estate?

D. 11. *Bryand contra Grhame.* 3. January 1666.

**I**N the case betwixt Mr *Andrew Bryand* and *George Grhame*, The said *George* being constitute assigney to a Bond granted by the said *Bryand* to *Thomas Jack*: And having charged thereupon, The Suspender offered to improve the Bond; and urged the charger to bide by the same, which he was content to doe in these terms. *Viz.* That he did abide by the said Bond as truly assigned and delivered to him by the cedent: And that the cedent would compear and abide by the same as a true Bond. The Suspender answered, that the cedent was *lapsus*, and had come out of Prison upon a *Bonorum*; and therefore he ought to find Caution to compear all the dyets of the Process. The Lords found, that the cedent should abide by the said Bond; with certification, that if he should not appear when the Lords should think fit, for clearing the question anent the falsehood of the Bond by his oath or Examination; the Bond should be declared to be void; and to make no faith both as to cedent and assigney.

D. 12. *Falconer contra E. of Kinghorn.* 4. January 1666.

**T**He Laird of *Drum* as Principal, and the Earl of *Kinghorn* and others as Cautioners, being Debtors to *Robert Falconer* by a Bond granted *in anno* 1640; And the said *Robert* having pursued this Earle of *Kinghorn* ( as representing his Father ) upon the said Bond: It was alledged, the Bond was null as to the Earl of *Kinghorn*, in respect there was no witness designed to his subscription: And it being Replied, that two of the name of *Lyon* were subscribing witnesses; and tho they were neither designed witness to *Kinghorn* his subscription, but subscribed witness *indefinite*; and albeit they were not otherwise designed, as they ought to be conform to the Act of Parliament by their Dwelling or otherwise; yet they were truly witnesses; and the pursuer may and doth now design them: and this Defender had no prejudice, one of the witnesses being yet on life: So that if he thought fit to improve, the means and direct manner of Improbation was yet competent.

The Lords allowed the Pursuer to design, which they would not have done, if both the witnesses had been deceased.

D. 13.

D. 13. Lady Bute contra Sheriff of Bute. 5. January 1666.

**T**He Lady Bute Dam Grissel Campbel being Contracted and Proclaimed with Mr. James Grahame; in the interim before her Marriage, was induced (and as she pretended forced) to grant a Disposition, and Discharge of a part of her Joynture in favours of her Son the Sherrif of Bute; he having, after the first Proclamation of their Bannes, stopped any further proceeding until he extorted the said deeds.

The Lords ( in a Reduction of the saids deeds at the instance of the Lady and her Husband ) found, that *post Sponsalia* and *Banna*, she was not *sui juris*; and could doe no deed in prejudice either of her Husband or her self without his consent: And that she was in the same condition, as if she were Married. And therefore the Lords found the reasons relevant, for reducing the saids Rights, both as to her Husband and her self.

It was alledged, that the Husband had consented, in sofar as after the saids deeds were done, he knew the same; and yet proceeded to Marry: The Lords repelled the Allegdgence.

D. 14. Oliphant contra Drummond. 6. January 1666.

**I**N a special Declarator, at the instance of Sir James Drummond of Machany having Right by Assignation, to the Escheat of the Lord Rollo, and his Brother Sir John Rollo of Bannockburn; from Walter Stuart Donatar to the same: Sir Laurence Oliphant and Gavin Drummond, Who were also Donators to the Escheat and liferent of the said Rebels, and had recovered a general Declarator; and had intended a special; having compeared and desiring preference, alledging that the pursuers gift was null and simulate; in respect by the Act of Parliament 1592. cap. 149. *Presumptio juris & de jure*, is introduced: And it is statute, that it shall be a relevant exception against any pretending Title by Assignation or Gift of Escheat of the Rebel, to alledge, that the Rebel his Wife and Bairns remained in possession; and it was subsumed, that the Pursuer and his Cedent had suffered the Rebel to continue in possession, since the date of the Gift in Anno 1658.

The Lords found, that the Rebels having been in possession a considerable time by the space of five years or thereabout; the Gift, by the Act of Parliament, is presumed to be simulate.

2. That though the Donatar Walter Stuart was a Creditor, it doth not alter the case; Seing he might be ( and Law presumeth he was ) satisfied; and Gifts being ordinarily affected with Back-bonds, it was his fault that he was not satisfied: And that he should not by his negligence and collusion prejudice other Creditors, who would have Right after he had been satisfied.

3. That the Pursuer having assigned his Right, the assigney is in no better case, & *utitur jure Authoris*.

4. That the reply, that the Land was comprysed, is not relevant; unless it were alledged, that the Pursuer or his Cedent had done diligence to attain possession, but was excluded by the compryser. Jo. Hay Clerk.

D. 15. Brown contra Veatch and Scot. 9. January 1665.

**I**N the case Brown contra Veatch and Scot, It was found, after contentious debate in *Præsentia*, At the Barr, and berwixt the Lords; That an Infeft-

Infestment of Warrandice base, to be holden of the granter, should be preferable to a publick Infestment of property granted thereafter holden of the Superior, and cled with possession diverse years: And that the possession of the Principal Lands should be interpreted the possession of the Warrandice Lands. Some of the Lords were of another Judgment upon these grounds. 1. By the Act of Parliament Ja. 5. par. 7. cap. 150. (Entituled provision and pains of them committand fraud in alienation and otherwise) a publick Infestment is preferable to a base not cled with possession though anterior: And both the *verba* and *Ratio Legis*, do militate in favours of the Heretor by a publick Infestment; The intention and end of the Law being to obviate fraud and prejudice by latent Infestments: And it being all one, as to the interest and prejudice of the party who acquireth Lands, whether the privat and latent Infestment be a Right of property or Warrandice, Seing an Infestment of Warrandice, when the principal Lands are evicted, becometh an Infestment of Property.

2. The Act of Parliament foresaid of K. Ja. 5th. is not taken away by the Act of Parliament K. James 6. Par. 17. anent Registration of Seafins; in respect, an Infestment of property being base, though Registrat and Anterior, will be null in prejudice of a party, who has acquired a Right by a posterior publick Infestment: And both the saids Acts of Parliament, being *remedia quæ tendunt ad eundem finem*, though the hazard be not so great as to the prejudice by latent and private Infestments, since the Act of Parliament anent Registration of Seafins: The said Act of Parliament 1617. doth not derogate to the Act of Parliament, K. Ja. 5.

3. As to that pretence, That the possession of the principal Lands is the possession of the Warrandice *fictione Juris*, It was Answered, That there is no such *fiction*, warranted by any Law: and so it is *Fictio*, but not *Juris*.

2do. It is a *Fictio contra Jus, & cui Jus resistit*; in respect the Heretor by the publick Infestment of property being in possession, no other person can be said to be in possession, seing there cannot be two *Domini in solidum*, nor two *Possessores* by distinct Rights, having no subordination or dependance one upon another, as Liferenter and Fiar, Superior and Vassal, Master and Tennent; or such like.

4. It is clear, that the possession of the principal Lands cannot be thought the possession of the Warrandice; Seing if after Fourty Years the principal Lands should be evicted; and a pursuir for Warrandice and recourse should be inted upon the Right of Warrandice, though Prescription cannot be obruded, yet if there be any defect in the Infestment of Warrandice, as *v. g.* The Disposition is subscribed by one Notar, or such like; The same may be alledged: Whereas, if that Infestment were cled with Fourty Years Possession, the Right would be prescribed, and could not be questioned upon any Ground whatsoever, but Falsehood.

In this Process, It was Questioned whether the Heretor, who had the publick Infestment, having been in Possession above Seven Years, should have the benefite of a possessory Judgement, until a Declarator and a Decreet in petitorio.

Some of the Lords thought, that in the case of Warrandice, the Heretor should not have the benefite of a Possessory Judgement against the Pursuer upon an Infestment of Warrandice; *quia non valebat agere*: But the question was not decided.



D. 16. *Cranston contra Wilkison, 14 July 1666.*

**B**Erwixt *Cranston* and *Wilkison*, It was Found (*Newbyth* Reporter) That a Person being conveyen as representing his Father, who was alledged to be vitious Intrometter to the Pursuers Debitor; the Title being passive and penal could not be a Ground of Action against the Defender to make him Lyable to the whole Debt; But only in so far as should be proven the Defunct did Intromet, and was *Locupletior: quia actio pœnalis non transit in heredem*: And the Defunct if he had been pursued in his own Life, might have purged the said Title.

D. 17. *Burnet contra Johnston 17. July 1666.*

**J**ohnston of *Frosterhil* having Disposed his Lands with absolute Warrandice in favours of *Gordon of Birsemoir*; Reserving his own and his Wifes Liferent; and thereafter having Disposed the same Lands in favours of *Mr. William Johnston*; who did obtain the first Infeftment: And being charged at the instance of *Alexander Burnet*, having Right by Assignment to the Disposition in favours of *Birsemoir*; The Letters were found orderly proceeded; notwithstanding the Suspenders alledged the Charger had no interest during the Suspenders Life; Seing he never did nor could possess; by reason of the Reservation foresaid: And the Lords found a difference, when Warrandice is craved upon a deed of the Party obliged, and upon any other ground: And that as to his deed he may be charged to purge it, without necessity to alledge a Distress.

D. 18. *Wedderburn contra Scrimzeour, 18. July. 1666.*

**A** Father having left a Legacy, thinking his Wife was with Child; in these terms; That if his Wife should have a Male Child the Legatar should have the Sum of 4000 Merks: And that if she should have a Daughter, the Legatar should have the Sum of 5000 Merks.

The Lords Found, That though she had no Child, the Legacy should be effectual *ex præsumpta voluntate Testatoris*; seing it cannot be thought, but that he rather intended a Legacy for him, if he had no Child; Than in the case she should bring forth a Child: *Et in conditionibus primum locum obtinet voluntas Defuncti, eaque regit conditiones*: L. 19. ff. de conditionibus. *Newbyth* Reporter.

D. 19. *Steill contra Hay. Eod. die.*

**A**Tennent being Ejected, Ejection was sustained at the Masters instance; though the Tennent did not concur: But it was not sustained *quoad omnes effectus*, viz. As to violent profits, *Juramentum in litem*; but only that the Master should be in the same condition he was before the Ejection; and should have the same manner of possession as if the Land were not void; and to uplift the duties; and to put in and remove Tennents. And for the Bygone ordinary Duties, in the same Process, it was Found; that the pursuer, though he was not Infeft, but only Appearand Heir to the Pursuer who was Infeft, might pursue the said Action, to recover his Possession, having been in possession before.

D. 20. Heddermick contra Wauch. Eod. die.

**T**HE Commissioners for the Borders, upon the Verdict of the Inquest that the Pannel was guilty of Receipt of Theft, having ordained the Pannel to pay 100 *lib. Sterl.* within a short time; and if he should faill to be sent to *Barbadoes* and lose his Escheat. *The Lords Found* That by that Verdict, there did arise to his Majesty, the Casualty of his Escheat: Whereof there being *Jus quasitum*; The King and his Donator could not be prejudged by a Doom which is contrary to Law: And that in such cases of Capital Crimes, the Law having determined the pain, and especially the loss of the Escheat; no Judge (even the Justice General) could moderate or lessen the famen.

D. 21. Biset contra Broun. 19 July. 1666.

**I**T was Found *nemine contradicente*; That a Stranger residing in *Holland*, *animo morandi* or elsewhere; Though by the Law of the place, his nearest of Kin, without confirmation, has Right to all Goods or Debts belonging to him: Yet if the Debt or Goods be due by *Scots-men*, or be in *Scotland*, they cannot pursue for the same, unless the Right thereof be settled upon them, according to the Law of *Scotland*, by confirmation if they be Moveables: Or by a Service if they be Heretable. *Hay Clerk.*

D. 22. Thomson contra McKitrick. Eod. die.

**F**ound, that a Comprising may be deducted upon an Heretable Bond, whereupon Infestment had followed, the same being payable without requisition; albeit a Charge of Horning do not preceed; seing there may be poinding upon such a Bond: And there is *Eadem Ratio* as to Comprising; and the Denunciation is a sufficient Intimation, that the Compriser intendeth to have his Money. *Hay Clerk.*

In the same Cause, *The Lords* having sustained a Seasin of burgage Lands, whereto the Sheriff-clerk was Notar, there being no Town Clerk for the time, by reason in the time of the *English* Usurpation, The Magistrates and Clerk refused the Tender. *The Lords Found*, That the said Seasin being within Burgh, though not under the hand of the Clerk, was not null upon that Ground that it was not Registrate; Because though the reason of the Act of Parliament for Registration of Seasins, and the exception of Seasins within Burgh, be, that Seasins within Burgh are in use to be Registrate by the Clerks in the Towns Books; yet the said reason is not exprest in the Act of Parliament: and the Act of Parliament excepting Bursal Seasins, the Party was *in bona fide* to think that there was no necessity of Registration.

D. 23. Eleis contra Wiseheart Eod. die.

**A** Wife being obliged with her Husband to pay a Sum of Money, and to Infest a Creditor in her Land: Though the Bond was not sustained as to the personal obligation to pay, yet it was found valid as to the obligation to Infest, and the Procuratorie of Resignation contained in the Bond

Bond: And the Wife notwithstanding, having Disposed her Land, she was found Lyable for the Sums as Damnage and Interest.

This Decision seemeth hard, In respect albeir a Woman may Dispose her Land with consent of her Husband; yet she cannot bind to pay a Sum of Money; And in the case foresaid, *non agebatur* that she should Dispose her Lands; But that she should be Lyable to the Creditor, and for surety he should be secured in her Land, And the principal obligation being void, the accessory of surety could not subsist.

D. 24. *Eodem Die.*

IT was debated but not decided, whether the Tenor of a Comprising may be proven; there is an Act of Parliament. Ja. 6. Parl. 6. That the Tenor of Letters of Horning should not be proven; and there is *Eodem* if not more *Ratio* as to Comprising, the Solemnities being greater and more: And if a Comprising, which is in effect the Execution of a Messenger, may be made up by a probation of the Tenor; *a paritate rationis*, Poindings, and Interruptions of Prescription by Citations, and Executions, and Intimations of Assignations, may be made up by Witnesses; and Arrestments and Decrets.

D. 25. Minister of *Moram* contra *Bairfoot*. *Eodem die.*

THE Minister of *Moram* having pursued a Reduction of a Tack, set by his predecessor; upon that Ground that it was above three years, without content of the Earl of *Buccleugh* Patron for the time: The Tack was sustained, in respect *Francis Stuart* had consented, in whose Favours *Buccleugh*, by a Decreet Arbitral, was obliged to denude himself of the Patronage.

This Decision seemeth to be hard; seing *Buccleugh* was full Patron, and was not denuded by the said Decreet: And the Right of the Patronage might either have been Comprised from him, or Disposed by him effectually, notwithstanding of the said Decreet, which did not settle the Right of the Patronage in the said *Francis* his person; but was only the Ground of a personal Action against *Buccleugh*, for denuding him of the Right of the Patronage: And as *Francis* could not present, so he could not consent as Patron to Tacks: Upon these considerations diverse of the Lords were of the contrair Opinion.

D. 26. *McKenzie* contra *Fairholme* 24. July. 1666.

IN the case of *McKenzie* against Mr. *John Fairholme*: Sir George *Mckenzie*, having by way of Reduction questioned a Bond granted by his Father, and himself as Cautioner, as null *ipso facto*: Upon that Ground that he was Minor when he Signed the Bond: And his Father being Administrator of the Law, and in effect Curator to him, had not Authorized him as Cautioner; and could not be author *in Rem suam*, the Pursuer becoming Cautioner *in Rem*, and at the desire and in behalf of his Father.

The Lords did not this day decide the Question; some being of Opinion, That a Father, though if his Children be *Impuberes* and Pupils, be the Tutor



Tutor and Administrator of Law, ye he is not Curator to his Children being *Puberes*: Seing a Son if he should desire other Curators to be given him, his desire could not be refused: *Et habenti Curatorem Curator non datur. Vide infra 26. July 1666. And 7. Decemb. 1666.*

D. 27. *Petrie contra Richart. eod. die.*

*Richart* of *Auchnacant* having a Wadset of 12000. Merks from *Buchan* of *Portlethem*; did thereafter enter in a second Contract with *Buchan*'s Son and Heir who had Right to the reversion; and diverse years Back-tack-duties being accumulated and made a Principal Sum, it was agreed that there should be no Redemption but by payment of the Sum contained in the said second Contract, made up as said is of the Sum contained in the said second Contract, and the Back-tack-duties; and by payment of the Annualrents so accumulated: Mr *Petrie* Provost of *Aberdeen* having acquired the Right of reversion, and having used an Order of Redemption, and thereupon having intented Declarator, it was alledged, that he should have consigned the Sum contained in the said second Contract, which he could not misken, by reason as he not only knew of the said second Contract before he acquired the said Right, but acted in relation to the said Contract and in effect homologate the same: In so far as, 1. By the said second Contract he and certain other persons being named and appointed to determine the question, betwixt *Richart* and *Buchan*, what should be paid to *Buchan* for the charges he had been at in prosecuting his Right against *Richart*, The said *Petrie* had accepted a submission relating to the said second Contract, whereupon a Decreet arbitral did follow, ordaining 300 merks to be paid to *Buchan* for his charges. 2. By the second Contract, *Buchan* was obliged to cause *Petrie* (being his friend) to give bond that he should engage for *Buchan*'s performance of the said second Contract: and accordingly *Buchan* being charged to fulfill that head of the said Contract, had procured a Bond from the said *Petrie* and produced it in Judgment the time of the discussing of the suspension. 3. *Petrie* had assigned the 300. Merks of charges modified by himself; and the instrument of intimation of the Assignment mentioned the said Sum to have been modified by the Decreet arbitral; proceeding upon the said Contract: From these Acts it was urged, that knowing and having homologate the said Contract in manner foresaid, he was *in pessima fide* to take a Right in prejudice of the Defenders, and to pretend to be in better case than his Author.

The Lords notwithstanding Found that the said second Contract not being Registrat in the Register of Reversions, he was not obliged to take notice of it; and might redeem by payment of the Sums contained in the first Contract. It was acknowledged by some of these who were for the decision, that these Acts imported an Homologation, But the second Contract though by our Law valid, was not favourable, and was against the common Law; in so far as the accumulating Annualrents to be a principal Sum, is *usura usurarum antinomum*. I have often urged that favour is not *nomen juris*, and Law ought to be uniform, and not *Lesbia Regula* plyable and variable upon pretences of favourable or not favourable: *Sed nunquam credita Teucris Cassandra.*

D. 28.

D. 28. *Harper contra Hamilton.* 25. July 1666.

**I**N the case Mr *John Harper* contra *Hamilton* his Vassal; It was decided, that after the intending a general Declarator of Non-entry, the Vassal should be lyable not only for the retoured dutie, but for the ordinary mails and duties of the Land: Though some were of the opinion, that before Sentence the Vassal should only be lyable for the retoured dutie.

D. 29. *Wilkie contra* eod. die.

**S**ir *John Wilkie* of *Foulden* having intented a Reduction of a voluntar Interdiction made by him to some of his friends.

The Lords appointed some of their number to conferr with him: and, upon their Report that he was rational and intelligent; and, for any thing appeared by his discourse and deportment, *Rei suæ providus*; The Lords Reduced in absençe; there being no compearance or opposition for the Interdicters.

D. 30. *The Lyon contra* 26 July 1666.

**B**Y the Act of Parliament Ja. 6. Parl. 11. cap 46. It is ordained, that Officers of Arms should find suretie to the *Lyon*, for observacion of their Injunctions, under the pain of 500. Merks, with the damage and interest of the party greived by the malversation, negligence, or informality of the Officer.

In a process betwixt the *Lyon* and It was controverted, whether the Cautioner might be pursued before the *Lyon* for payment of the Debt, as damage and interest, by reason of the malversation of the Officer of Arms in a poynding. It was alledged, that the *Lyon* was a criminal Judge, and most competent as to the Question, whether the Messenger had committed iniquity, and malversed in his Office, and whether he should be deprived; and he and his Cautioner had incurred and should be lyable to the pain aforesaid: But as to the civil action against the Cautioner, there might be a good ground of action against the Cautioner, upon the act of caution before the competent Judge; But the *Lyon*, being *Judex pedaneus*, was not Judge of actions of that nature and consequence, In respect they may be of great difficulty and importance: For if the Cautioner should be pursued for payment of the Debt, being supposed to be 1000 merks, upon pretence of the malversation of the Officer, and that he had not done his dutie in poynding and comprying; It were hard and dangerous, that the *Lyon* and his Bretheren should be Judges in a matter of that consequence: And it will not follow, that because the Messenger had not done his dutie in a Caption or comprying, that his Cautioner should be lyable for the Debt as damage and interest; Seing the Caption and Comprying might have been ineffectual, and the Creditor could not thereby have gotten payment: And it appears by the said Act of Parliament, that the *Lyon* is only Judge to the penal Conclusion of deprivation of the Officer, and payment of the pain.

The Lords notwithstanding Found the Lyon Judge competent to the action against the Cautioner, for damage and interest; *Me inter minimos reclamante*. Gibson Clerk. Newbyth Reporter.

D. 31. McKenzie contra Fairholm. eod. die.

THE Lords Found in the case before mentioned, ( 24. July Mckenzie contra Fairholme ) That a Father is *loco Curatoris* to his Son being *in familia*; and that a bond granted by the Son without his consent is null *ipso jure*; as if it had been granted by a Minor having Curators without their consent.

D. 32. Wedderburn contra Scrimzeour. ead. die.

IN the case Scrimzeour and Wedderburn of Kingennie (mentioned before 18. July. ) A legacy being to be effectual in that case only, if the Testators Wife should not be brought to bed of a Male Child; It was Found, that a Male Child should be understood a living Child: and that *Homo Mortuus* and a dead Child is *nullus* in Law: And that the legacy should be effectual, though she had been brought to bed of a Male Child, but dead.

D. 33. Menzeis contra Burnets. eod. die.

IN the case Menzeis contra Burnets, It was Found, that a Relict being provided to a Liferent of all the Goods belonging to her Husband; ought to sell and make Money of the Horse, Oxen, and such Goods as may perish; to the effect she may Liferent the Money and make the Sum forthcoming after her decease; but *cum temperamento*, That a competent time should be allowed to that effect: And if the Goods should perish in the mean time, she should not be liable for the same. In that same case it was Found, that a Relict should not have both a Liferent and Third; but should have her choice or option of either. Some of us were of the opinion, that seeing it appeared by the Contract, that the Goods were not to be in Communion, but that she was to have a Liferent of the same, she had not a choice to have a Third or Liferent. Hay Clerk. Lord Lie Reporter.

D. 34. contra Blantyre. 27 July 1666.

Having intended a Reduction of an Interdiction, upon that reason, that Blantyre was *rei sue providus*; And that the Pursuer had lent him the Money due to him, when he was in England, and in necessity; and being a stranger and a Creditor, he ought not to be prejudged by such a voluntar Interdiction; being upon a Bond granted by the Debitor without a previous Sentence, finding Blantyre to be *prodigus*, or such a person as should be interdicted.

The Lords Thought The Case of that Consequence, that they would not decide upon a Report, but Ordained it to be debated *in presentia*. Lord Castlehill Reporter.

D. 35.



D. 35.                      contra                      eod. die.

**I**T was decided, That an Executor Creditor was lyable to do diligence as other Executors; and tho there was a difference betwixt him and other Executors, upon that account that he was confirmed in order to his own interest, and to the effect he might be payed of his Debr, and had preference before other Creditors; yet as to the Duty and Office of an Executor there was no Difference: And having accepted the Office which was *Voluntatis*, it became *Necessitatis*, and he was obliged to Execute it. *Reidie Reporter.*

D. 36.                      L. Borthwick contra Ker.                      eod. die.

**A**N Inhibition being raised upon the dependence of a pursuit for mails and duties, for three years preceeding the Summons and in time coming during the defenders possession: *It was Thought*, that the inhibition relating only to the Summons as to the three years preceeding, without mention of the subsequent years; could not be a ground of Reduction *Ex capite Inhibitionis*; in respect the defender in that pursuite was assailed as to the years before the Summons, as being *bona fide Possessor*: And albeit the Summons was not only for these years, but for the time to come as said is; and the Defender was decerned to pay mails and duties for certain years after the Summons, yet the Leidges were not obliged to take notice of the Summons, but as it was related in the Inhibition.

*The Lords* were of this opinion: But the case was not decided, the Pursuer having desired up his process that he might be better advised. Advocate, *Oliphant.* and Sir *Robert Sinclair.*

D. 37.                      E. Newburgh contra Stuart.                      eod. die.

**S**ir *William Stuart* being Creditor to the Earl of *Newburgh*, in a great Sum, upon an Infeftment in the said Earls Lands: after his Majesties Restauration, he was induced (tho there was no Question as to the Debt) to make a Reference and Submission to the Laird of *Cochran* and Sir *John Fletcher*; upon no other account, but that he apprehended that *Newburgh* might trouble him and cause him be fined; which was the ordinary and Ignoble practice of Noblemen at that time against their Creditors: These Arbiters did take from the said Sir *William* a discharge of the Debt and renunciation of his Right, and from *Newburgh* a blank bond as to the Sum; and the said Debt then amounting to 40000 merks, they did give to the Earl of *Newburgh* the Renunciation; and to Sir *William*, *Newburgh's* simple bond filled up with 6500. Merks only: *Newburgh* pretending that Sir *Alexander Durhame* (then Lord *Lyon*) was owing him Money, did by way of letter give a precept to the Lord *Lyon* in these terms, That he desired him to pay that Sum to the bearer upon sight, and that he should retire his bond: This letter being presented to the *Lyon*, he in a scornful and jeering way subjoynd to the letter, *My Lord, I am your Humble Servant*: the Earl of *Newburgh*, not satisfied to have payed Sir *William* in manner foresaid as to 3400. Merks, did intent a pursuit against Sir *William*, That he might be free of the Residue and get back his Bond of 6500.

6500. Merks, upon that pretence that the said Sir William had got from him a Bill of Exchange, which had been accepted by the deceased Sir Alexander Durham; at the least in case of not accepting, he should have protested and intimated to Newburgh, that it was not accepted nor satisfied, that he might have recourse against the said Sir Alexander in his own time, whereof he is now prejudged.

Upon a Debate *in praesentia*, It was Found, that the said letter was not a Bill of Exchange but a precept; and that the receiving of such precepts upon Chamberlanes and others, being for the Creditors further suretie, do not oblige them to the formalities of presenting, protesting, and intimating: which are in use in the matter of Exchange and Trade betwixt Merchant and Merchant. Advocats Lockhart, Wallace. contra Wedderburn and Chalmers.

D. 38. Crawford contra the Town of Edinburgh. last of July 1666.

A Donator, by a Gift of *Ultimus Haeres*, having Pursued for a movable Debt due to the Defunct; The pursuit was not Sustained, because the Gift was not declared.

D. 39. Gray contra Gordon. eod. die.

A Bond being granted to Sir Robert Farquhar, and bearing the term of payment to be diverse years after the date of the same; and Annualrent to be payed in the *interim*, termly and yearly: Was found to be Heretable *quoad Fiscum*, Though Sir Robert Farquhar had deceased before the term of payment of Annualrent; And the assigney was preferred to a Donatar.

D. 40. Halyburton contra Halyburton. eod. die.

A Son having intented a Reduction of a disposition made by his Father, for provision of the rest of the Children, *In lecto aegritudinis*.

The Lords found the Defence relevant, that the Pursuer had consented; in so far as the Son had Subscribed as Witness, and knew and heard the disposition; so that he was not ignorant of the tenor of it: And it was remembered by the Lords when they were voting, that they had found the alledgance relevant, That a Son and appearand Heir that Subscribed as Witness to his Fathers deed *in lecto*, without that addition, that he heard it read; in the case of Stuart of Escog: It being to be presumed, that the appearand Heir being of age, would not be Witness to such deeds, unless he inquired and knew what they were.

D. 41. Cuming contra Johnston. 7. Novemb. 1666.

Some Lands in Dumbar being disposed by one Adamson in favours of Johnston; with a provision contained in the disposition and Infeftment, that a Sum of Money should be payed by the receiver of the disposition, to him or any he should name: And in case it should not be payed the Right should be void: And the saids Lands being thereafter apprysed, It was found, against the compryser, that the said clause and provision was real: And that the person named, and having Right to the Sum

Sum and benefit of the said clause, Though before declarator he could not pursue a removing, yet he has good interest to pursue for the mails and duties for payment of the said Sum; and being *in possessorio*, to retain the mails and duties for payment of the said Sum *pro tanto*: And that the said provision, and such like, are effectual against singular Successors. It was urged by some, That all, that could be done upon that Clause, was, that a Reduction of the Right might be pursued thereupon; But it was answered, that it being *actum*, that the Lands should be burdened with that Sum, and if nothing more had been exprest, but that it is provided that the said Sum should be payed; the said provision being real, would have furnished the said action and exception, for payment of the said Sum out of the maills and duties: And therefore, the subjoyning the resolute clause, being *ad majorem Cautelam*, could not be prejudicial nor retorted in prejudice of the disponent nor his Assigney. This Question was hinted at but not decided in the said Debate, *viz.* If the Declarator should be pursued, upon the said clause for annulling the Right, if it should operate in favours of the Assigney, the Lands not being disposed to him in case of contraveening; being to appertain to the disponent and his Heirs, in case the Right should be rescinded. Its thought, that the provision being assigned, the whole benefit and consequence of the same are disposed: and consequently the assigney, in the case foresaid of annulling the Right, may pursue the Heirs of the Disponent and receiver of the Right, and his Successor to denude themselves of the Right of the saids Lands. *Newbyth Reporter.*

D. 42. *Hay contra Magistrates of Elgin. eod. die.*

**I**N the case *Colin Hay* against the Magistrats of *Elgin*; Improbation being proponed against the Executions of Messenger, bearing that he had intimated to the Magistrats, that he had arrested a prisoner at the instance of the said *Colin*: And the Magistrats and Witnesses compearing and urging to be examined, It was alledged for *Colin*, that they should not be examined; Becaute the Messenger who was also cited was not present; and that if he were present he might condescend upon circumstances, and remember the Witnesses that they had been Witnesses; it being otherwise incident to them to have forgotten, though they had been truly Witnesses to the Execution. It was answered for the Magistrats, that they had cited both Witnesses and Messenger; that they had done all that was incumbent to them; and his not appearance, ought neither to prejudice them nor the Witnesses: And that having come in obedience to the citation, they should not be troubled to come here again, their Residence being at such a distance.

*The Lords* indulged so far to *Colin*, as to delay the Examination of the Witnesses until further diligence should be done to bring here the Messenger, *Me Refragante*: but ordained *Colin* to pay the expences: And if it had been desired, that if the Witnesses should die, they should be holden as improving; *The Lords* would have granted the desire.

D. 43. *Carse contra Carse. 8. Novemb. 1665.*

**D**OCTOR *Carse* having taken a Right of Annualrent out of Sir *David Cunningham's* Lands, in the name and persons of *Mark Carse of Cockpen*



and *Adam Watt* Writer; and a compring thereafter deduced in their name to the behoof of the Doctor, for some arrears of the said Annualrent, not only out of the Lands out of which the Annualrent was due, holding blench or feu; but of other Lands holding Ward. *Charles Carse* Son and Heir to the said Doctor, pursued the said *Mark Carse* and the Heir of *Adam Watt*, to denude themselves of the Right of the saids Lands, conform to a Backbond granted by the said *Mark Carse*, and the said *Adam Watt*, declaring the trust: In that trust it was alledged for the Defenders, that they were content to denude themselves, they being releved of all hazard they might incur upon occasion of the said Trust, and having that Right in their Person; and to that purpose did offer a Disposition, bearing a provision that the Right should be burdened with the relief of Wards, Marriages, and Ministers Stipends, Cefs, and other such hazards. It was Answered, that the said Disposition ought not to be clogged with such a provision, which would fright Buyers from purchasing the saids Lands; and the pursuer was necessitat, and had presently an occasion to sell the saids Lands: And as to the incumberances, and hazards, which the Defenders should condescend upon they should be purged: But as to the Marriage of *Adam Watts* Heir (which was condescended upon) there could be no hazard upon that account, In respect the compring at the instance of *Mark Carse* and *Adam Watt* was the fourth compring, which did only import a Right of reversion; The first compring, whereupon Infestment had followed, carrying the Right of property: It was Duplyed, that if it should appear that the former appryings are either null or informal or satisfied, the fourth Apprying would carry the Right of property, and consequently the Marriage.

*The Lords Found*, that the Pursuer should accept the Disposition with the burden of the said relief: Or in his option should secure the Defenders by a Bond with a Cautioner, to releive them.

D. 44. *Bowie contra Hamilton.* 10. Novemb. 1666.

*H*AMILTON of *Silvertounhill* having Disposed to *James Bowie* certain Lands, whereto he had Right by Compring; and the said *James* being removed at the instance of a Wadsetter; and having Pursued upon the Warrandice contained in the Disposition; It was alledged by *Silvertounhill*, that though the Disposition did bear absolute Warrandice; yet by a Margine subscribed, it was restricted to warrand only the formality of the Compring, and the truth of the Debt, and the Executions. It was Answered, that the Warrandice being absolute in the Body of the Disposition, was indeed qualified by the Margine, that it should only be extended to the Warrandice of the Lands, in so far as concerns the Apprying and Sums thereinmentioned (which are the words of the Margine) and that the said Warrandice imports that the Disposer should not warrand simply, but as to the Sums contained in the Compring; so that in case of eviction *Silvertounhill* should only refund the same; and the Pursuer was content to restrict the Warrandice to the Sums payed by him: It was urged, that there being Three kinds of Warrandice viz. Either absolute; or only that the Compring was formal, and the Debt just; or a restricted Warrandice to refund the price in case of eviction; the Last was *Medium inter extrema*, and most equitable; and *in obscuris magis aqua interpretatio*,

*pretatio, est contra Disponentem facienda, qui potuit Legem apertius dicere:*  
And if it had been intended, that he should warrand only the formality, and validity of the Compyring, and reality of the Debt, it had been so exprest.

Yet *The Lords*, by plurality of Voices, *Found*, that the Warrandice should be interpret, to warrand only the validity of the Compyring, and the reality of the Debt: That being the most ordinary in Rights of Compyring. *Sinclar, alteri Harper.*

D. 45. *Cheine contra Christie.* 15. Novemb. 1666.

**G**George Cheine Pursued Adjudication against *David Christie* of a Right of Annualrent, which pretained to *James Christie* the said *David's* Brother the Pursuer's Debitor. *James Cheislie* Writer compeared and alledged he had Right to the Lands (craved to be adjudged) by an expired Compyring of the property of the same against the said *David Christie*, who had Right to the saids Lands; and that the said *James* his Right of Annualrent was null, being base, and never cled with Possession.

*The Lords Found*, that the alledgance was not competent *hoc loco* against the Adjudication; and that the said debate would only be competent after the Adjudication, when he should pursue a poynding of the ground. The Lords Found the contrare before, in an Adjudication Pursued by *Sornbeg* contra the Lord *Forrester*, which practise was obruded and not respected; Because the Lord *Forresters* Right in that Case was clear; And this the Lords thought hard, *Forrester* being content to dispute his Right, that a Right to his Lands should be established in the Person of another to trouble him. But it were fit our Practiques were uniform: And it appears hard, that a Creditor who is a stranger, and has not the papers in his hands, and is not in a Capacity to pursue for them before he get a Title by Adjudication, should be forced to Dispute his Debtors Right. *Newbyth Reporter.*

D. 46. *Abercrombie contra* eod. die.

**F**Found, that a Pursuit upon an Assignment after the Summonds execute; should not be Sustained, though the Cedent concurred; the Pursuit not being at his instance. *Newbyth Reporter.*

D. 47. *Kennedy contra Hamilton.* eod. die.

**T**He Lords Found a Compyring upon a charge to enter Heir, null; Because the person, at whose instance the charge was, had no Right to the Debt the time of the Charge; the Assignment, whereby he had Right, being acquired thereafter; so that the Charge was *Inanis*, and without ground. *Me referente.*

D. 48. *Binning contra Farquhar.* Eod. die.

**A**Disposition being made by a Father in favours of a Son; And thereafter the same Lands being Disposed by the Son in favours of his Brother in Law: The said Rights were questioned by a Creditor, as being fraudulent; being Disposed by the Sons Contract of Marriage; which though Onerous, as to Provisions in favours of the Wife, is not so as to the Son.

Son, whom the Father could not advance, or provide in prejudice of the Creditors: But it was alledged, that the Disposition made by the Son, was for an Onerous Cause; and by the Act of Parliament, though a Right should be found fraudulent, yet a third party acquiring *bona fide*, by the Act of Parliament is secured; and his Right cannot be questioned, unless he be *particeps fraudis*, or acquire the same without an Onerous Cause, which by the Act of Parliament, is only probable *Scripto vel Juramento*.

Yet the Lords enclined to reduce the Right granted by the Son, unless it were offered to be proven, that it was for an Onerous Cause; in respect of several presumptions alledged and informed by the Pursuer: And before Answer, as to the Relevancy ordained both Parties to condescend upon their presumptions *hinc inde*; of Fraud or the Cause Onerous for the granting of the said Right, and to prove the condescendence. I have ever thought, that the practice of the Lords to ordain Parties to prove before Answer, as it is late, is accompanied with many inconveniencies; seeing by such Acts, which are not of Litiscontestation, Processess are still kept loose; and after that irregular way of probation, the debate of Relevancy is again resumed; to the great vexation, both of Parties, and Lords: and after the Lords Interloquitor of Relevancy, there may be again Litiscontestation; So that upon the matter there are two Litiscontestations in one Cause. *Newbyth Reporter*.

It being again debated, What the Certification should be in such Acts. *viz.* Whether the Alledgance should be holden as not proponed; or that the Lords should advise: Which in effect is no certification.

The Lords were not clear to detetmine; which is a great Informality, and a pressing reason against that anomolous way.

D. 49. *Reid contra Tailzifer. 16. Novem. 1666.*

IN the case, *William Reid contra Tailzifer and Salmond. It was Found* That a Testament is to be thought execute, so that, thereafter, there is no place to a *non Executa*, when a Decreet is recovered against the Debtors; though the Executor decease before he get payment: Because the Right of the Debt is fully established in his person by the Decreet; and he having done diligence, it ought not to be imputed to him, that the Debtor is *in mora* as to the payment of the Debt: And there being *Jus quæsitum* by a Decreet, and Execution having followed thereupon by Horning; after which Annualrent, though not due *ex pacto*, yet becometh due *ex lege*; or by Compyring at the instance of the Executor, and Infestment thereupon; It were absurd, that all these Rights should evanish; which would necessarily follow, if there were place to a *non Executa*: Seeing the Decreets and Rights foresaid following thereupon, could not be transferred or settled in the person of the Executor *ad non Executa*; who doth represent the Defunct only, and not the Executor, at whose instance the Decreet is obtained and Execute.

D. 50. *Purves contra Blackwood. Eod. die.*

*Adam Purves* having pursued Reduction and Improbation of a Compyring, and the Grounds and Warrands thereof, against *Blackwood.*  
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*The Lords*, In respect the Comprising was deduced Twenty four Years before, did refuse to grant Certification, against the Letters ad Executions; and against one of the Bonds being Registrate when the principal Bonds were given in to the Clerk Register to ly *in publica custodia*; In respect of the Troubles of the Time, and the loss and disorder of the Registers; and that the Extract was produced, and the Defender was content to abide at the Truth thereof. *Hay Clerk*, And *Newbyth* Reporter.

D. 51. *Govan contra Paip*. 24, Novem. 1666.

IN the case, *Govan contra Paip*, *The Lords Found*, That an Assignation not being intimated in the Cedents time (and consequently the Debt being in *bonis Defuncti*) ought to be confirmed: But the Lords in consideration that the Debt was small, *Found* Process at the Assignneys instance, he finding Caution for the *Quot* effeirand thereto.

D. 52. *contra Miln. Eod. die.*

AN Order being used for Redeeming a Wadset; the Executor Creditor of the Wadsetter pursued the person in whose hands the Consignation was made for payment of the Sum Consigned; And in the Process the user of the Order was called, and Decreet was obtained; but before it was Extracted he decessed; and there was debate upon the Oath of the Consignator. *The Lords Found*, That the user of the Order being a person having interest and called *ab initio*, nothing could be done until the Process was transferred against some person representing him.

In the same Process, it was argued amongst the Lords, whether a Sum being consigned upon an Order of Redemption, the user of the Order may pass from it, and lift the Sum without consent of the Wadsetter? And it was remembered by some of the Lords, That upon an Instrument of Consignation Process was sustained at the instance of the Wadsetter against the Depositary, in whose hands the Sum due upon the Wadset was consigned, for making the Sum forthcoming. But in this case nothing was done.

It appeareth, that after Consignation, *Jus* is *Quasitum* to the Wadsetter; so that the Sum, being consigned and sequestrate to his behoof, cannot be uplifted without his consent.

D. 53. *Lefly contra Bain*. 6. Decem. 1666.

IN a pursuit to make forthcoming, after serious deliberation and debate amongst the Lords as in a case daily occurring, and wherein the Decision would be a preparative and practique,

*It was Found*, That a pursuit to make forthcoming a Sum of Money due to a Debitor, is in effect Execution; and equivalent to a poinding: Seing Money being *in nominibus*, and not *in specie*, could not otherways be affected and poinded; and therefore could not follow, but upon a Decreet, and not upon a Bond not Registrate. 2. *It was Found*, that an Arrestment is but an Inchoat and incompleat Diligence: and notwithstanding thereof the Sum Arrested remaineth *in bonis* of the Debitor: Se-

ing notwithstanding thereof, Goods belonging to a Debitor may be pould: As also Arrestment being a Negative Diligence, whereby a Sum Arrested is secured, so that the Debitor cannot uplift; and the person, in whose hands the Arrestment is made, cannot pay or give away the same, in prejudice of the Arrestor; and as in *immobilibus*, Inhibition doth not establish a Right in the person of the Creditor; unless he deduce a Compyring; but doth affect the same, so that the Debitor cannot prejudice the Creditor, and his Diligence if he Compyre: There is *Eadem Ratio* in Arrestments in *mobilibus*. Upon these Grounds it was Found, That the Debitor deceasing, the Sums Arrested being in *ejus bonis*, ought to be confirmed; and that the Creditor could not have Action against the person in whose hands the Arrestment was made; and the Apperand Heir of the Debitor called for his interest; but should confirm himself Executor Creditor.

D. 54. *Monteith contra E. Callender and Gloret. 7. Decem. 1666.*

THE Laird of Parkley Hamilton as principal, and Hamilton of Kinglassie and certain others his Friends as Cautioners, being Debtors in Two Bonds; Kinglassie, in consideration that Parkley had Disposed to him a Right of Wadset which he had to the Lands of Touch, by a Contract did oblige himself to satisfy and pay the Sums contained in the said Bonds; and to procure Discharges from the Creditors to Parkley and his Cautioners: And nevertheless having payed the said Sums, he did not take Discharges but Assignations to the said Bonds, which he filled up in the name of Sir Mungo Stirling of Gloret his own Creditor; who did thereupon Arrest a Sum due by the Earl of Callender to Parkley: Thereafter Captain Monteith having Right to Callenders Debt by Assignment from Parkley, obtained a Decreet against the Earl; which being Suspended upon double poulding, It was alledged for Gloret, that he ought to be preferred, in respect of his Assignment and Arrestment; whereunto it was Answered, that Kinglassie being obliged (as said is) to pay the said Sums had payed them; and whereas he should have taken Discharges, he had taken an Assignment Blank in the Assignees Name, and had filled up Glorets Name in the same; So that Assignment being procured by him, and lying by him, and he being Master of it, it was in effect his; and he was in the same case, as if the Assignment had been granted to himself, and he had made a Translation to Gloret; in which the Exception upon the obligation foresaid to relieve Parkley; as it would have been competent against Kinglassie, would have secluded also Gloret his Assignee by Translation: In this Process Gloret his Oath being taken; and he having declared, that the Assignment was procured by Kinglassie; and by him delivered to Gloret, and that he payed nothing to the Cedent, but that the Assignment was given to him by Kinglassie, that he might be satisfied of certain Sums due to him be Kinglassie, which he was to Discharge if he recovered payment, by vertue of the said Assignment.

The Lords upon a Debate *in praesentia*, preferred Monteith; and found the Exception, which was competent against Kinglassie, if the Assignment had been to him and transferred by him to Gloret, is competent against Gloret; and that he is in the same case, as if he had Right by Translation from Kinglassie. This is most just, and founded upon Law and Equity, being

feing otherwayes Fraud cannot be obviate; And, in Law *plus valet quod agitur, quam quod simulate concipitur aut exprimitur*: And, *Fictione brevis manus*. Though it appear that it is but one Act, viz. The Assignation made to *Gloret*; yet in construction of Law, there is two Acts, viz. The granting the Assignation blank to *Kinglassie*, which in the interim before it was delivered to *Gloret* was his evident; and an Assignation immediately made to himself, and thereafter the filling up *Gloret's* Name, and the delivery of the Assignation to him, which upon the matter is a Translation. *Spotswood* for *Monteith*. *Lockheart*, *Cuninghame*, *Maxwell*, and *Weir* for *Gloret*.

D. 55. *Mckenzie contra Fairholm. Eod. die.*

**S**IR *George Mckenzie* having intented Declarator and Reduction of a Bond Subscribed by him as Cautioner for his Father; *Ex eo capite*; that it was null *ipso jure*; in respect he was Minor for the time; and his Father was *loco Curatoris* to him, and had not Authorized him, at least could not be Author to him *in rem suam*: It was alledged, that he had not intented Reduction within the *quadriennium utile*: And as to the Declarator of Nullity, the reason was not Relevant, In regard Bonds granted by Minors, having Curators, without their consent are Null; they being interdicted *eo ipso* that they do choise Curators, that they do nothing without them; But Bonds granted or other Deeds done by Minors wanting Curators, are not Null in Law; but the Minors lesed by the same may crave to be Reponed *Debito tempore* by way of Reduction: And that the Father, though he be Tutor in Law for the Children being Pupils, he is not Curator being *puberes* and of that Age that they may choise their their own Curators.

The Lords notwithstanding Found the Reason relevant; and declared the Bond Null as to the Pursuer: *Quibusdam refragantibus, inter quos Ego*; upon these Grounds, that there is a great difference betwixt Tutors and Curators, Pupils, and *Puberes*, the Father haveing by the Law power to name Tutors, and consequently being Tutor of Law himself, and having that Authority which may be derived, and given by him to others; whereas he has no power to name Curators to his Children, when they are of that Age that they may choise themselves: And though he should name Curators in a Testament, his Nomination could not bind his Children. And 2. If Children being *Puberes* should choise any other persons to be their Curators, they would exclude and be preferred in that Office to the Father; Whereas *habenti Curatorem Curator non datur*. 3. If a Child should have an Estate *aliunde*, and the Father (his Son being *pubes*) should *cessare* and be negligent in the Administration of his Estate, there could be no Action against him for his omission; which might be competent against him and his Heirs if he were Curator. *Gibson* Clerk, *Sinclair* for *Fairholme*, the Defender; *Wedderburn* and *Lockheart* for the Pursuer.

D. 56. *Urquhart contra Frazer. Eod. die.*

**A** Wadset being granted by Sir *Thomas Urquhart* Elder and Younger of the Lands of *Brae* to Sir *James Frazer*, for 24000 Merks; and the Granters



Granters of the Wadset, being obliged to warrand the Rental (besides Customs) to be Twenty Chalders of *Ross* bear; and to furnish Tennents, and to cause them pay the said Duty; and for each Boll undelivered Ten Merks: Sir *Alexander Urquhart* of *Cromarty*, Donatar to the Escheat of the said Sir *Thomas Elder* and Younger; pursues the Heir and Executor of the Wadsetter, for the superplus of the Rent of the said Lands, exceeding the Rent of the foresaid Sum for diverse Years; In respect the Contract was usury: It was alledged, by the Act of Parliament 247. Anno 1597. The Creditor cannot pursue for the superplus of the Annualrent but by way of Reduction of the usury Bond, or Contract, with Concourse of his Majesties Advocate. It was Replied, That *Rei persecutoriâ* he had interest to pursue for what was *indebite* payed.

*The Lords Found*, That the Process could not be sustained, without concurrence of His Majesties Advocate; The Act of Parliament being express, that the Creditor cannot repeat the excrescence above the Annualrent; unless he concur with the Advocate to reduce: which appeareth to be provided, of purpose to oblige the Creditor to inform and concur with the Advocate, for reducing so unlawful pactions.

D. 57. *Urquhart contra Cheyne. Decemb. 8. 1666.*

SIR *Thomas Urquhart* of *Cromarty* having disposed to Mr. *William Lumisden* a Tenement of Land and Salmond-fishing, for Surety of 4000. Merks borrowed from *Lumisden*; the abovementioned Sir *Alexander Urquhart* having Right by Comprising to the saids Lands and Fishing, and reversion of the said Wadset; pursued a Compt and Reckoning against *Walter Cheyne* having Right to the said Wadset, and to hear and see it Found, that the Sum due upon the Wadset was satisfied and payed by the said *Walter* and his Authors Intromissions: It was alledged, that the Wadset being a proper Wadset without a Back-tack, the Defender was not Lyable to Compt; and tho he were, he was not Lyable to Compt but since the date of the Right, and for his own Intromission. It was Replied that it was a Right granted for security, and that by the Contract of Wadset and the Eik to the Reversion thereafter, the Right was redeemable upon payment of the principal and Annualrents that should be unsatisfied; whereas in proper Wadsets, there is an *Antichresis*, and the Rents of the Land belongs to the Wadsetter in lieu of the Annualrents, whereto the Debitor is not Lyable.

*The Lords Found*, That though the Right was not clear and express, that the Wadsetter should have Right for surety, and until he be satisfied by Intromission or otherways; yet the Reversion being in the Terms foresaid, it was *Actum*, and intended that the said Wadset should not be a proper Wadset, but only for surety as said is.

D. 58. *E. Cassils contra Whitefoord. Eod. die.*

THE Lands of *Damertoun* being a part of the Barony of *Cassils* and formerly holden Ward by the Lairds of *Blairquhan Kennedies*, of the Earl of *Cassils*; and now being in Ward through the Minority of the present Heritor, who had Succeeded in the Right of the saids Lands being acquired from the Laird of *Blairquhan*. The Tennents of the saids Lands  
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Pursued a multiple poynding against the E. of *Cassils* and *Whitefoord* now of *Blarquhan*, and the Heretor of *Dalmertoun*; all pretending Right to the multures of the saids Lands. The E. of *Cassils* alledged, that during the Ward they should bring their Corns to his Miln of the Barrony of *Cassils*, there being no Milns upon the Lands of *Dalmertoun*. The Laird of *Blarquhan* alledged, that he was infest in the Lands of *Blarquhan* and in the Miln of *Dalhovan*, upon a Right granted by *Kennedy* of *Blarquhan* *cum astrictis multuris & usitatis*; at such a time as *Blarquhan* had Right to *Blarquhan* and *Dalhovan* and to the Lands of *Damertoun*: And that before the said Right granted by *Kennedy* of *Blarquhan* to *John Whitefoord* of *Ballach* Author to this Laird of *Blarquhan*, the Tennants of *Damertoun* were in use to come to the said Miln, and to pay the like multure and service as the Tennants of *Blarquhan* did; and since the Right, have been in use to come constantly to the said Miln. It was Answered for *Cassils*, that unless there were an expresse Constitution of Thirlage, the said Lands of *Dalmertoun* (being a distinct Tenement from the Lands of *Blarquhan*, which hold of the King) cannot be alledged to be astricted to the said Miln of *Blarquhan*: And if it had been intended that the Lands of *Dalmertoun* should have been astricted, It would have been exprest: And when the same did belong to *Kennedy* of *Blarquhan*, it cannot be said that it was astricted to his own Miln with the foresaid Servitude, *quia res sua nemini servit*; and he having Disposed his Miln, it cannot be presumed that he would have Burdened his own Lands with a Servitude: And though it were clear *Kennedy* had astricted the saids Lands of *Dalmertoun*, yet he could not Constitute a Servitude without the Superiors consent in his prejudice, when the Lands should Ward in his hands. It was replied by *Whitefoord* of *Blairquhan*, that the Superior had consented to the Thirlage, in so far as *John Gilmor* and one *Bonar*, having Comprysed the saids Lands of *Dalmertoun* from *Kennedy* of *Blarquhan*, and having Assigned their said Comprysing to *John V Whitefoord*; the said *V Whitefoord* by Contract did Assign the same to *Kilkeren*, with a Reservation of the multures thereof to the Miln of *Dalhovan*: And the said E. had granted a Charter to *Kilkeren* upon the foresaid Right.

The Lords thought, That these Words *Cum multuris usitatis*, do relate only to the quantity of the multures as to such Lands, as can be shown to be astricted: But before Answer to the Debate upon the said Charter and Reservation, They ordained the Charter and Contract containing the Reservation to be produced, That they might consider, Whether it be in the Charter, and how it is conceived; and what it should operate if it were only in the Contract.

The Lords enclyned to think that a clear Reservation, though there were not a preceeding Thirlage, should import a Constitution, as to these who accept or consent to such a Reservation.

D. 59.

Leslie contra Leslie.

eod. die.

**P**atrick Leslie of *Balquhoyn* pursued a general Declarator of the Single and Liferent Escheat of *John Leslie* of *Balquhoyn*, against *James Leslie* and his Spouse as nearest of Kin to the said *John*. It was Alledged, that the Horning was prescribed, the Declarator being raised forty years after the Horning. It was Replied, That though Prescription should run against the King (which was denied) yet in this case it could not; The

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King being Minor the time of the Prescription diverse years, and the Government being interrupted; So that there was not *Tempus utile* during the Usurpation: And the King is not in use to dispose of Escheats, until application be made to his Majesty: And by the Act of Parliament, it is provided, that the negligence of his Officers should not prejudice him.

*The Lords Found*, That the Horning did not prescribe, in respect of the Kings Minority, and Interruption foresaid.

It may be asked, If that reply of his Majesty's Minority and Interruption, were not competent? And if the Escheat were gifted by a Lord of Regality, or a Superior, *Quid Juris*? And it seemeth, that a *Horning* being *pana*, and once execute, it doth not prescribe; Seing the Rebel, if he should survive fourty years, his Liferent would fall to the Superior; and there is no reason that he should *Lucrari*, and be in better case *ex culpa*, and by the continuance of his Rebellion for so long a time.

D. 60. *Hume contra Creditors of Kello*. 12. Decemb. 1666.

**I**N a Proceſs betwixt *Hary Hume*, and the Donator of the Foreſaulture of *John Hume of Kello*, and certain others his Creditors; *It was Found*, That a Comprifing being deduced before *January 1652*, and being the firſt effectual Comprifing, ought to be preferred to the *poſterior* Comprifings; ſo that they ſhould not come in together *pari paſſu*: In reſpect tho they were within year and day of the compleating, and the making effectual the firſt Comprifing by Inſeſtment or Diligence, yet they were not within year and day of the deduceing the ſaid Comprifing: and the ſaid Comprifing being before the year 1652. doth not fall under the compaſs of the Act of Parliament concerning Debitor and Creditor; which bringeth in *pari paſſu* Comprifings led ſince *January 1652*; and being *Correctoria Juris Communis*, ought not to be extended.

D. 61. *Thomſon contra Stevenſon*.<sup>2</sup> *eod. die*.

**I**N a Reduction of a Right and Diſpoſition of certain Houſes; being purſued *ex capite minoris atatis*; It was alledged that the Diſpoſition did bear 500 *merks*, to be payed, and the Defender was content to quite the right being payed of the Sum.

*It was Found*, That the Alledgance was not relevant, unleſs he ſhould offer to prove it really payed, and profitably employed for the uſe of the Minor.

In this Proceſs the Lords would not ſuſtain the Reaſon *per ſe*, unleſs Leſion were joyned and libelled, *viz.* That the Lands were diſpoſed *sine Decreto Judicis*.

D. 62. *Shaw contra* 13. Decemb. 1666.

**S**haw being confirmed Executor to his Brother a Factor at *London*, and diſverſe Decreets being recovered againſt him, at the inſtance of the Deſuncts Creditors; He deſired a Suſpenſion upon that Reaſon, That he had done Diligence to recover the Deſuncts Debts and Goods; and that he could not ſatiſſie the Decreets obtained againſt him, until he ſhould



should recover the Defuncts Estate: and that he was content it should be divided amongst the Defuncts Creditors, according to their Diligences; and therefore craved a Suspension without Caution; being content to make Faith that he could not get a Cautioner.

*The Lords* past a Suspension as to personal Execution only.

D. 63. *Hamilton contra Brown.* 15. Decemb. 1666.

**H**amilton of Grange being pursued as representing his Father, upon the Title of *Behaving* and *Gerens pro Herede*, for payment of a Debt of his Fathers: It was alledged, that this Condescendence, *viz.* That he had behaved as Heir, in sua far as he had granted Dispositions of Land belonging to his Father. And 2<sup>ly</sup>. That he had consented as appearand Heir to some Right of Lands apprysed from his Father, Is not relevant; unless it were said and alledged, that he had done these Deeds before the expyryng of the Compyryng; feing he could have no Right after the expyryng of the same; and neither could be Heir, nor *Gerens pro Herede* as to such Lands: And as to his consent, it was not sufficient unless he had disposed.

*The Lords* inclined to be of this Judgement, That his consent being as appearand Heir, should import Behaviour; and that though the Compyryngs were expyred, he might have an interest to question the same, as not formal or Null, or satisfied by Intromission, or by some other Ground: and that by his consent he was denuded of that Interest; and therefore such Dispositions should import Behaving: Yet in respect the Writes which were to be used to prove the Passive Title were not produced, and much may depend upon the wording and conception of the same. *The Lords* thought fit to ordain before Answer, the Writes to be produced, and assigned a Term to that effect: But declared, that their Act should be Litiscontestation *quoad hoc*, That the Pursuer, after the Term is run upon the said Act, should not get others, as if there were not Litiscontestation, *Lockhart* for Grange, and *Birnie* for the Pursuer.

D. 64. *Hartshaw contra Hartwoodburn.* eod. die.

**S**cot of Hartshaw pursued a Declarator of Property within the Botinds libelled, and that he had been in Possession by pasturing, and doing other Deeds of Property, and debaring the Defender *Hartwoodburn* and his Predecessor: In this Process there was an Act of Litiscontestation; whereof a Reduction was intented, upon that Ground, that the Defender was absent, and was *Minor* and *indefensus*, wanting Tutors and Curators for the time, his Tutor being dead: and that he had a defence *Minor non tenetur placitare*.

*The Lords Found*, If the Summonds had concluded the possessorie of Molestation: And if that had been lybelled, that the Pursuer, the time of the intending the Pursuit, was in Possession; would have repelled the Defence (that *non Tenetur*) against the molestation: But because a Declarator of Right was only lybelled, they reponed the Minor; And Found that *non tenetur placitare*. *Longformacus* for Hartwoodburn, and Sir George McKenzie for Hartshaw.

D. 65.

D. 65. L. Colvil contra Feuars of Culrofs. eod. die.

**T**He Lotd Colvil being Baillie of the Regality of Culrofs, and lyable to uplift the Taxation of that *Abbacy*; And having charged certain of the Vassals to pay their Taxation; They suspended upon that Reason, That a fifth Part more than the Taxation was stented upon them, on prentence, and in consideration of Charges.

*The Lords Found*, That they could not be stented to more than the Taxation; tho the Sheriff and Baillies of Regality be lyable to uplift the Taxation.

Yet it seems hard, that they should be at the Charges of raising of Letters, and Registration of Hornings, and such like: And albeit the Vassals, who are content to pay their Proportion, should not be lyable to more; yet it may appear, that it is reason, that when the Sheriffs or Bailies give in what they have uplifted, their Charges should be allowed.

D. 66. Hay contra Littlejohn. 16. Decemb. 1666.

**L**ittlejohn having comprised the Liferent Right of a Tenement in *Leith*; the said Tenement became ruinous; and by the fall of a part of it, did crush a part of the next house adjoining to it, belonging to Hay of *Knockondie*. In a Pursuit *Knockondie* against Littlejohn, for Damage and Interest.

*The Lords* sustained Process; The Pursuer proving that the House was manifestly ruinous; without necessity to lybel or reply that the Pursuer had required the Defender to repair his House: It being sufficient that the case of the House was such as did really require and call for Reparation, in order to his own Interest, and for preventing his Neighbours: So that it being his Fault, that he did not repair the same, he was lyable to refund the Pursuers Damage: And albeit by the Act of Parliament, Liferenters may be urged to find Caution to keep their Liferent Lands *Sarta tecta*, and in the condition they found them at their Entry: And by the Civil Law, Neighbours may be urged to find Caution *Damni infecti*: the said Remedies are not privative, in case any Prejudice be done before they be taken.

D. 67. Allan contra Campbel. eod. die.

**E**Dinample Campbel being pursued as representing his Father, upon the Title of behaving as Heir: It was alledged, that he intromitted with the Duries of the Lands descended upon, by a Right to two Comproysings against his Father: It was replied, The Comproysings were not expired the time of his Fathers Decease, so that in effect he was Heretor.

*The Lords Found*, That *Gestio* being *magis animi quam facti*; The Defenders Intromission by vertue of a Title, did not infer Behaving.

D. 68. Menzies contra Burnet. Decem. 18. 1666.

**A** Relict being provided to the Liferent of the conquest durence the Marriage, and pursuing for the same; It was alledged, that the Money

in question, which the pursuer pretended to be conquest durement the Marriage, did belong to the Defunct before the Marriage; and that the Bond was renewed after it: The Question was, what way the said Alledgance, tending to take from the Pursuer the benefite introduced in her favours by Write, and by her Contract of Marriage, could be proven? Yet the *Lords* enclined to find it probable by the Debitor, and the Witnesses in the Bond; But before Answer, They Ordained the Defender to use such Probation as he thought fit, for proving the Alledgance; Reserving to themselves to determine what it should import.

D. 69.                      contra                      18. Decem. 1666.

**I**N a Process against an Heir of Provision: It was Alledged, that the Heir of Line ought to be first discusst: It was Replyed that the Heir of Line was conveyened and Renounced: And it being duplyed, That the Estate belonging to the Heir of Line, and whereto he should have Right if he were served Heir, ought to be discussed.

The *Lords Found*, No Process against the Heir of Provision, until the Heir of Line was discusst; and that the Renunciation of the Heir of Line was not sufficient; but that the Creditor behooved to proceed to Adjudication *contra hereditatem Jacentem*, belonging to the Heir of Line.

D. 70.              Deacon of the *Weavers* contra the *Magistrates*  
of *Edinburgh*. 1. June. 1667.

**T**HE Deacon of the Weavers being imprisoned by the Magistrates of *Edinburgh*, because he had disobeyed their Order, anent the putting in their Hand a Box for the Poor of the Journey-men; until some Questions betwixt the Masters of the Trade and the Journey-men of the same should be decided; did crave by a Bill to be enlarged, upon that reason, that the Craft had intented a Reduction of the Contract betwixt their Predecessors and their Journey-Men, concerning the keeping and having a Box for the Poor of the Journey-men: And that until the Decision of the Process, the Box ought to be kept by their Deacon.

The *Lords* Ordained the Complainer to be enlarged, by Consigning the Box in the Clerks Hands. Upon occasion of the said Process, it was agitated amongst the *Lords*, Whether there could be a Contract and Transaction betwixt the Craft and Journey-men, who are not an Incorporation, and cannot oblige their Successors? Seing there can be no Successors but of a Person or Incorporation: But the *Lords*, without giving Interloquitor upon that point, Ordained the Reduction to be heard summarily. *Gibson Clerk. Mckenzie alter Lockheart.*

D. 71.              *Young* contra *Young*. 4. June. 1667.

**I**N the case *Young* contra *Young*; It was agitated, Whether a Husband be Lyable for his Wifes Debt before the Marriage, being proven no otherways but by her Oath durement the Marriage: If the Husband declare he does not distrust her, and believeth she hath declared Truth.

The *Lords* did not decide the point; but some were of the opinion, That if the Husband Declare upon Oath, that he believeth she did Declare



clare Truth, he will be Lyable; in respect that by the Law, the Husband is Lyable for the Wifes Debt being Legally proven: And the Question is only, whether the Wife may declare in prejudice of her Husband; which she cannot do, because otherways it may be in the power of an untoward Wife to undoe her Husband: which inconveniency ceaseth when the Husband declareth, he hath no reason to distrust the Wife, and that he believeth she hath told Truth: The great Question will be, Whether the Husband may be urged to give such an Oath of Credulity? Seing whatever a Husband thought, yet having an Imperious Woman, he should be forced to comply with her, and to declare that he believeth her, otherways he would have a miserable Life. *Scot Clerk.*

D. 72. *Thomson contra Stevenson. Eod. die.*

**I**N the case *Thomson contra Stevenson*, The Lords Found, that the Extract out of the Kirk-Session Books, is not a sufficient Probation of Age to infer Reduction *Ex capite minoritatis*: But the case being *difficilis probationis* after a considerable time; They Found, that *aliqualis probatio* ought to be received, with the Adminicle foresaid. *Norvel. alt. Wallace, Hamilton Clerk.*

D. 73. *Zinzian contra Kinloch. Eod. die.*

**Z***inzian* having poulded; pursued a Spuilzie against *Kinloch*, having meddled with some of the poulded Goods: The time of the advising the Cause, the Defender offered to improve the Poulding *in data*. The Lords Repelled the Defence *in hoc statu*, Reserving Action: In respect the Poulding was produced *ab initio*; notwithstanding it was alledged, that the Defence was *noviter veniens ad notitiam*; which the Lords did not respect; because the Poulding being produced *ab initio* (as said is) The Defender should have tryed and might have had the same Information, which he has now of the same: In the same Process, though the prices of the Goods Spuilzied were not proven, because it is to be presumed that the prices contained in Pouldings are not too high; And the Lords having considered the poulding, Found the prices low. *Haytoun Clerk.*

D. 74. *Mitchel contra Mitchel. 12. June. 1667.*

**T**HE Lords upon a Bill ordained Witnesses to be received before *Litis contestation*; and their Depositions to ly *in Retentis*; Because they were in Town for the present; and were to go to *Zetland* and *senes valetudinarii* and *peregre profecturi*: And upon such like considerations, others may be received Witnesses *in hoc statu*. *Scot Clerk.*

D. 75. *Lumisdan contra Summers. Eod. die.*

**I**N a Declarator of Escheat, it was alledged, that the Goods Lybelled were Disposed to the Defender: It was Answered, that the Disposition was *stante Rebellionne*: It was Replied, That in Fortification of the

the Disposition, it was offered to be proven, that the Disposition was made for the price of Corn, and Straw, and other Goods disponed to the Rebel; and whereby His Majesty, and his Donator had benefite; in respect the same was employed for the Entertainment of the Beasts, and Sowing the Ground, whereof the Encrease fell under Escheat.

*The Lords Repelled the Defence: And Found* that the Rebel being Lyable only personally, for the price of the Goods alledged Disponed; and the property of the Goods in Question being his; the same belonged to the King: And the King and his Donator was not obliged to debate upon what account and occasion the Rebel was Debitor to the Defender: Or what use he made of the Goods Disponed to him by the Excipient, And is in no worse case than a Creditor poinding, or Arresting; or any other person acquiring Right to the property of Goods; who would be preferred notwithstanding such pretences; there being no such Hypothec that can be pretended by the Law of *Scotland*. Diverse instances were adduced by me to this purpose; not only in behalf of the King, but of other Superiors and Heretors, as *V. G.* If a Superior should pursue Declarator of a Liferent, and it should be alledged that after Rebellion the Rebel had Disponed a part of his Lands; And that it should be offered to be proven, that the Money for which the Disposition was given, was lent, for acquiring the Right of the Lands; So that thereby the Superior had benefite thereby: Or if the Master were pursuing by vertue of the legal and tacite Hypothec competent to him, and it should be alledged that the Tennant was Debitor to another, for the price of Corns furnished for Sowing the Ground; In which cases the Superior and Master could not be frustrate upon any such pretences. *Birnie, alter Thoirs & Frazer, Hamilton Clerk.*

D. 76. *Dalrymple contra Eod. die.*

**A** Reduction of a Testament being pursued, *Ex eo capite*, that the Defunct was *fatuus & incompos mentis*: And the Relevancy being questioned; because no Act or Circumstance, or qualification was Libelled, inferring the Defunct to be in that condition.

*The Lords* Ordained the Pursuer to condescend. *Wallace alt. Hog.*

D. 77. *Harroway contra Haitly. 14. June. 1667.*

**J** *Anet Harroway* pursued the Heirs of *Alexander Haitly* her Husband, to hear and see the Tenor of her Contract of Marriage with her said Husband proven, being lost, as was pretended, the time of the Troubles: It was alledged, that no Adminicle in Write was Lybelled or produced; And whereas it was Lybelled, that *John Nicol* was employed as Writer for drawing of the Contract, the double of it was insert and extant in his Servants Stile-Book; The said Stile-Book being neither a Write under the Defuncts hand, nor a Minute nor a Record Extant in any Register, could not be sustained as any Adminicle.

*The Lords*, Albeit it was offered to be proven by the persons alledged to be Writer and Witnesses to the Contract; that it was subscribed, and of the Tenor Lybelled, and other probabilities were urged; Yet they did not sustain the Summonds without an Adminicle, upon that considerati-

on in special, that our Law, *ob Lubricam fidem* of ordinary Witnesses, against whom there is possible no legal exception, deferring so little to their Testimony, That Transactions, Agreements, or Promises above the value of 100 pounds cannot be proven by Witnesses; If such pursuities should be sustained, without Adminicles of Writ; Contracts of greatest importance might be made up, and proven by Witnesses; It was remembered by some of the Lords, that in the Process, *Corsar contra Durie*, The Lords were so tender, that upon a contentious debate, a Seafin was found not to be an Adminicle.

D. 78. *Antrobus contra Anderson. Eod. die.*

**G**eorge Antrobus English-man, pursues William Anderson Provost of Glasgow for 234 lib. 13. shillings Sterling, due by John Herbertson, sometimes Baillie of Glasgow; upon that ground, that being charged to take the Debtor upon Letters of Caption, he had refused to concur with the Messenger: It was alledged, that the Defender was not in sight of the Rebel; and though it be pretended, that it was shown to the Defender, that the Rebel was in the same House, in another Room for the time, yet the Defender being chief Magistrate and Provost of the Town, he was not obliged to go himself to seek the Rebel; and it was sufficient he was willing to send his Officers; and did send them to that effect: Especially it being considered, that the Provost was charged about Nine of the Clock under Night; and the Army having come that same Night to Glasgow, he was the very time that the Messenger charged, with the Quarter-Master, and other Officers, about the business of quartering the Forces: All which amounteth to a Relevant Defence to free the Defender of an odious pursuit; the pursuer having no prejudice; in respect the Rebel was, and is notoriously Bankrupt, and was imprisoned a few days after, and continued a long time Prisoner in Glasgow.

The Lords Found the Allegiance Relevant.

The Lords are in use to sustain such Actions *in subsidium* against Magistrates for payment of the Debt, when they suffer the Debtor to escape out of Prison; But when a Magistrate is charged with Letters of Caption, bearing no Certification, but Horning, it appears hard to me, that the Law having defined and prescribed the pain and certification, that the Lords should sustain any other penal Action without the warrant of an Act of Parliament; And that the Magistrates for a *Culpa* or neglect, should be Liable to the whole Debt, which may be a great Sum. If the Action be considered, not as a penal Action, but for Damage and Interest, it should be only sustained, in so far as the Creditor is prejudged; so that the Debt being either recoverable, and the Debtor in as good case as before, or being Bankrupt the time of the Charge, the Magistrates may be denounced upon the Caption, or censured for their Contempt, but ought not to be Liable for the Debt *in solidum*. Scot Clerk.

D. 79. *Davidson contra the Town of Inverness. Eod. die.*

**T**here being a Decreet of the Dean of Gild of Inverness against an Unfreeman, Unlawing him in Three Hundred Pounds, for Trading: and



and a Suspension and Reduction being raised of the same, upon that reason. *viz.* That the Suspender dwelt without the Towns Jurisdiction: And that by the Acts of Parliament, Unfree-Traders may be charged to desist, and to find Caution to that effect; But the Town or Dean of Gild cannot proceed to process or unlaw them; there being no such Act of Parliament to warrant it; but only to Charge (as said is) and to confiscate the Goods.

D. 80.

*Forbes contra Blair. Eod. die.*

**D**OCTOR *Forbes* and his Spouse, having recovered a Decreet against *David Edgar*; The said *David* did grant a Disposition in favours of his Mother; whereof the Doctor and his Spouse did intent Improbation and Reduction; and after long dependence, Certification was granted and Extracted; But the Defender having given in a Bill, craved to be Reponed, pretending that the Certification was granted in Winter, when the Defender being an Aged Woman, and attending one of her Children being Distracted, could not come in the time of a Storm; and within five or six dayes after the Certification was granted, she came and produced the Disposition;

The Lords before Answer, whether they would repone against the Certification, Ordained them to dispute upon the Reasons of Reduction. *viz.* That the Disposition was *inter conjunctas personas*, without an Onerous Cause; and that the Condescendence was not relevant, *viz.* That the Disposer had granted Bond for Aliment and Entertainment of him and the other Children to his Mother, and for her Terce; In respect the said Pretences were only patched up to colour the said fraudulent Disposition: And that the said Disposer, *pendente lite* and after Sentence, could not in prejudice of the Pursuer give a Bond, to be the ground of the said Disposition; But if there were any ground of the said pretended Debts, the Defender should have recovered Decreet for the same: and though the Debt were without question, the common Debtor, contrare to the Act of Parliament, could not make a voluntar Disposition, in prejudice of the Pursuers Diligence; to gratify and prefer another Creditor. It was Answered, That by the Act of Parliament, the Reason, (*viz.* That the Right was granted without an Onerous Cause) is only probable *Scripto vel Juramento*: and that the Disposer not being inhibited, the Defender might lawfully *sibi vigilare*, and take a Right for a just Debt: And by the Act of Parliament, the Diligence, that disableth a Debtor to give, and a Creditor to take a voluntar Right, is not a Dependence or a Decreet, but Inhibitions and Hornings, which are so publick, that the Leidges may and ought to take notice of them.

The Lords were tender to repone against the Certification: and yet they thought not good to take away the Disposition upon the Certification; seing the Write was produced, and not suspected nor questioned to be false; and the Defender did excuse and purge her negligence (as said is:) and the Disposition being in her favours, who was *sub potestate Mariti*, and should be defended by him, having her self in Law neither *velle* nor *nolle*, his negligence should not undo her: And therefore the Lords having considered also the Difficulties in the Debate, upon the Reason, they reduced the Disposition in manner aftermentioned, by refer-

ving to the Defender to pursue for the said pretended Debts: and declared, that if she recovered Decreet, (the Pursuer always being called, that there be no collusion) the Defender shall come in *pari passu* with the Pursuer: and that the Disposition shall stand to that effect only: Both the Parties acquiesced to the Decision.

D. 81.

*Cheap contra Philp. eod. die.*

**M**R. *Cheap* pursued a Reduction of a Disposition made by *Philp*, in favours of Mr. *John Philp*, upon these Reasons; That it was subscribed by two Notars, and their Subscriptions did not bear *de Mandato*; and because one of (the Notars was known) to be of so great Age, that he had not been for a long time employed as a Notar, and that he had only subscribed his Name; The rest of the Solemn Words used by Notars when they subscribe *in subsidium*, being written by the other Notar; Therefore another Notar had been also used, besides the two Notars; And that no respect ought to be given to his Subscription, by reason it was *ex Intervallo*, and not *uno contextu*. 2. That the Disposition was *in lecto*.

The Lords, When the case was reported, debated upon the first Reason, and in special upon these Points. 1. Whether in Subscriptions *in subsidium* by Notars, it be essential it should be exprest, That they subscribed *ex mandato*; and if that solemnity may be supplied, by offering to prove that the Notars were *Rogati*: It was urged, that Minuts and Abbreviations of Seafins might be extended and transumed, though none of the ordinary Solemnities be exprest, and therefore such Defects and Omissions may be supplied: It was Answered, That in Abbreviations, *Omnia presumuntur solenniter acta*; But when an Instrument is compleat, or any other Write, if it want the Ordinary Solemnities, they cannot be supplied; & *solennitas non presumitur*; And being only probable by the Write it self, it cannot be made up by Witnesses. 2. It was debated, Whether a Father or Grand-father could be Notar, in a Write or Right in favours of the Son or Grand-child.

The Lords did demurr upon these Points, and thought fit, that before Answer as to these, the Reason founded on *Lecto* should be discussed.

D. 82.

*Watt contra Halyburton. eod. die.*

**J**Ames *Halyburton* being infest upon a Comprising, in some Acres in *Dirleton*, did grant a Disposition of the same to *Adam Watt*, whereby he was obliged to infest him by two Infestments; whereupon the said *Adam Watt* his Son, having Right by Assignment from his Father, pursued *William Halyburton* as Heir to the Disposer, for implement and obtaining himself infest, and thereafter to infest the Pursuer: It was Answered, That the Disposition was in the hands of *Adam Watt* by the space of twenty years, and that he had made no use thereof: and that the Defenders Father had done all that he could, for denuding himself of the said Right, the said Disposition bearing a procuratory of Resignation: and that the Lands holding Ward, if the Defender should enter, his Ward and

and Marriage would fall; so that unless the Pursuer would warrant him as to that hazard, he cannot be obliged to infest himself.

The Lords decerned, reserving Action to the Defender for Damage and Interest as accords.

D. 83. Key contra Fleming. 15. June 1667.

**G**eorge Fleming, having an Infestment of Annualrent out of the Lands of Cambo, and thereafter having comprysed for his Principal Sum: It was Found, in a double Poining and Competition betwixt the said George and Gilbert Key another Creditor of Cambo, that the said Gilbert should be preferred; in respect of the said Gilbert his Infestment in an Annualrent: That Decreet being suspended, Fleming craved to be preferred, in respect his Right of Annualrent was before Key's Right: It was Answered, That this Infestment was extinct and taken away by the Comprysing; and that he could not now have recourse to it, after a Decreet of Preference in foro contradictorio: It was Replied, That Decreets of double poining preclude as to bygones; but as to the future, all are qualified, for any thing that was then seen.

The Lords were clear, that notwithstanding of the Comprysing, he might have recourse to his former Right: But the great Question was, Whether Decreets of Poining the Ground, against a Party compearing, did include him, so that he could not be heard against Competent and Omitted? which the Lords did not decide; but recommended to the Reporter to settle the Parties. Gibson Clerk.

D. 84. Home contra the Countess of Murray. 18. June. 1667.

**J**ames Home of Beaprie having Assigned to the Countess of Murray the Gift of Escheat of Sir John Kininmonth, and certain Debts due by the said Sir John; The Lady, by her Bond, granted that she had got the said Right, and obliged her self either to make payment to the said James of the foresaid Sums, or to Repone him to his own place: The Lady being pursued upon the said Bond, alledged that it was null, being granted by her during her Marriage without her Husbands consent: It was Answered, that the desire of the Summons was alternative; either to pay or Repone the Pursuer; Et deceptis non decipientibus succuritur. The Lords having debated amongst themselves upon the reason of the Law annulling Deeds, stante Matrimonio done by Wives; and some argued, that Women Married are not in the condition of Pupils who have not *judicium*, nor Minors who have not *Judicium firmum*; and that they are Lyable *Ex delicto vel quasi*, and *ex dolo*. The Lords, before Answer to the Debate, whether her Assertion in the Bond, viz. That she had received the Writs mentioned in the same, should be Obligatory, at least so far as to Repone the Pursuer; They Ordained her to be Examined anent the cause of granting the Bond. Gibson Clerk.

D. 85. Johnstoun contra Cuninghame. 19. June. 1667.

**A** Bond being granted to a Husband and his Wife, and the Heirs of the Marriage; which failzieing their Heirs; was Found to pertain  
to



to the Husband after the Death of the Wife *in solidum*: And that these words (*their Heirs*) ought to be understood *Civiliter* of the Heirs of the Husband, as being *persona dignior*.

D. 86. *Watson of Dunnykier contra his Vassals*. 21. June. 1667

THE said *Watson* having Feued certain Crofts; with a servitude in his Muir of *Path-head* to Winn Divots and Clay, for Building and Repairing the Houses Built, and to be Built by the Vassals; pursued Declarator that it should be lawful to him to improve the Muir, leaving as much as would be sufficient for the use foresaid: It was Alledged, that the Servitude did affect the hail Muir; and that their Right flowing from himself could not be restrained; & *sibi imputet* who did grant it in the Terms of the said Latitude.

The Lords considering that it was intended that the said Servitude should only be for the end foresaid, and it would be a prejudice both to the publick interest which is concerned, that the Country should be improved, and waste unprofitable Grounds Laboured; and to the pursuer also; without the least advantage to the Defenders: They therefore Ordained as much Ground to be set apart, as might more nor sufficiently serve for the use foresaid; and allowed the pursuer to labour and improve the rest, without prejudice to the Defenders to make use even of the rest during the time it continueth in the present condition and not laboured; And it case it should happen upon any occasion, that what should be set apart for the Feuers use foresaid, should prove short and not sufficient for that use, they reserved Liberty to them, to have recourse to the residue; and granted visitation to the effect foresaid. *In presentia*, *Lockheart* and *Cheap* alter *Mckenzie*.

D. 87. *Hay of Stravan contra Oliphant*. 22. June. 1667.

IT was Found, That a Miln-dam could not be drawn from one side of a Burn to another, without a Servitude or consent of the Heretor having Lands on the other side; and that the Heretor is not obliged to debate, whether he had prejudice or not; The Lands on the other side being his and the Burn *medio-tenus*. 2. It was also Found, that he might lawfully demolish the Dam; unless it were alledged, that the Miln had gone the space of Fourty eight Hours; So that it might have come to his knowledge that it was a going Miln. *Haystoun* Clerk.

D. 88. *L. Blantyre contra Walkinshaw*. 2. July. 1667.

IN a Reduction the Lord *Blantyre* contra *Walkinshaw*, *Ex capite minoritatis*; It was Found that the granting of a Bond though with consent of Curators, being persons above all exceptions, was Lefion; and that it was not sufficient to alledge that the Money was actually delivered to the Curators; or to the Minor in their presence; unless it were also alledged that it were converted to his use.

This seemeth hard, for the borrowing of Money by the Minor whose Affairs may require the same, was not Lefion; but the misemploying of it, which is the fault of the Curators.

D. 89.

D. 89.

contra

*Eod. die.*

**A**N Affignation being made to Maills and Duties of a Tenement of Land, for the Year in which it was granted, and in time coming without Limitation: *The Lords Found*, That the Heir of the Cedent ought to have a formal and valid Disposition of the Land, wherupon the Assigney may be Infeit; Seing otherwayes he could not be secure as to a perpetual Right to Maills and Duties against a Singular Successor: *Et concessio Jure conceduntur omnia sine quibus explicari non potest.*

D. 90.

*Mcbræ contra McLaine. 8. July. 1667.*

**I**N the Process *Mcbræ contra McLaine*, being for removing a Tutor suspect; upon many Grounds, and inspecial, that the Tutors Father had been Tutor to the Pupils Father and had not compted; and that the Tutor and his near Relations had Questions and Actions of great importance with and against the Pupil.

*The Lords inclined*, That another Friend should be joined to the Tutor; But no Answer was given by the Lords to the Dispute: only the pursuers Procurators got a time to condescend upon a person fit to be joined.

D. 91.

*Crie contra E. Finlator. 9. July. 1667.*

**A** Creditor having obtained a Decreet *in subsidium*, for payment of his Debts, against the Magistrates of *Dundee*; and having Assigned the Bond wherupon the Debt was due to the Magistrates, they pursued the Cautioners in the Bond; who alledged, that the Debt and Bond being satisfied by the principal or Town of *Dundee*, who was Lyable *loco Rei ex delicto*, the Cautioners were liberate.

*The Lords did demurr and delay to give Answer. Vide infra 24. January. 1668.*

D. 92.

*Grange Hamilton contra Smith. Eod. die.*

**T**He Lords Found, That as the payment of Annualrents, so the payment of Feu-duties may be proven *prout de Jure.* Hay Clerk.

D. 93.

*Watson contra Law. 15. July. 1667.*

**I**N the Process *Watson contra Law*, It was Found, That *Kirklands* being Disponed with absolute Warrantice; The Disponers are obliged to warrand from the Designation of a Gleib: Though it was alledged, that *ex natura rei*, and not *ex defectu Juris*, The said Gleib was evicted.

Thereafter it was Found in the same Cause; That the Designation being as to Cows, and Horse-grass; and upon a Law supervenient after the Disposition: *viz.* An Act in the late Parliament; The Disponer ought not to warrand from a Supervient Law.

D. 94.

contra

Eod. die.

**E**Xhibition being pursued by an Appeara<sup>n</sup>d Heir, to the end he may advise, not only as to the Writes in favours of the Defunct, but such as were granted by him.

*The Lords* superceeded to give Answer as to the last Member, until they should consider the Act of *Sederunt*: It being alledged, by some of the Lords, That by an Act of *Sederunt* it was ordained, that no person should be forced to exhibite Writes granted by Defuncts, in favours of himself or his Authors, Except Writes granted by Parents; Or Husbands in favours of Wives and Children.

D. 95. *Hamilton contra Symenton.* 16. July 1667.

**I**T was Found, That the Mother, being Liferenter of all that could belong to the Daughter as Fiar and Heir to her Father, was obliged to entertain her; and *de facto* having entertained her, could crave nothing for her aliment, though the time she was entertained, she was only appear-and Heir, and thereafter was about to renounce to be Heir. *Hamilton Clerk.*

D. 96.

*Elleis contra Keith.* eod. die.

**T**HE Lords, upon debate and deliberation, Found, That a Person addebted in payment of a Sum upon a Wadset, may pay his Debt, and take a Renunciation, tho the Creditor granter be inhibited; and that Inhibitions do not affect Renunciations.

The Reasons that moved these that were for the Decision, are. 1. That Inhibitions do hinder the Liedges to purchas from Persons inhibited, but not to borrow Money from them; and as they may lawfully pay the Sums they borrow, so they may take Discharges and Renunciations. 2. When a Person does grant a Renunciation of a Wadset, he doth not grant a Voluntar Right, but only a Discharge upon the matter, which in Law he might be forced to give, upon an Order of Redemption. 3. A Person inhibit might take Payment and grant Discharge of an heretable Bond, even before Sums due upon such Bonds became arrestable. 4. If Inhibitions should affect Renunciations of Wadsets, then they could not be granted without consent of the Creditor who had inhibited, even after an order of Redemption. 5. The Inhibition, where it mentioneth and prohibiteth Renunciations, is to be understood of Voluntar Renunciations, which the Party inhibit is not obliged to grant; As *v. g.* An Heretor having a Base Right irredeemable, should after Inhibition renounce the same. 6. If a Wadset had been granted before the Inhibition, the Creditor may renounce, because in Law, and by the Contract he is obliged upon payment to renounce, so that it is not a voluntar Deed; And there is *eadem Ratio* in Wadsets after Inhibition; seing the Right is granted with that condition that upon payment the Creditor should renounce; And as I may grant a Right to a Person inhibited, so I may grant it with that Quality, that he should be obliged to re-dispone, in which case he may lawfully dispone back again, notwithstanding of the Inhibition.

D. 97.



D. 97. *Ker contra Ker. eod. die.*

**T**he Lords Found, That an Executor, notwithstanding of the Oath given upon the Inventar, the time of the Confirmation, may be urged to declare upon Oath, whether since the Confirmation, it is come to his Knowledge, That some Goods and Debts were omitted, which he did not know the time of the Confirmation, and whether he has gotten greater Pryces than are contained in the Inventar. *Gibson Clerk.*

D. 98. *Sir James Keith contra Lundie. eod. die.*

**A** Decreet being obtained against Sir James, as charged to enter Heir of Tailzie to his Brother *Alexander, in foro*, for payment of a Debt due to *Lundy*; Two Exceptions being proponed and admitted, and the Term circumduced; he craved to be reponed against the said Decreet, Alledgeing that the Procurator, who pretended to compear for him in the Decreet, had no Warrant, and was sick for the time.

The Lords inclined to repone him as to personal, but not as to real Execution: and desired the Reporter to deal with the Party to consent. *Hamilton Clerk.*

D. 99. *Hermiston contra L. Sinclair. 17. July 1667.*

**H**ermiston being bound to pay to the Lord *Sinclair* his Brother, out of the first and readiest of the Rents of the Estate of *Sinclair*, a certain Annuity.

The Lords Found, That he ought to pay the said Annuity entire; tho he pretended he was not obliged simply, but out of the Rents; and that the said Rents, in respect of the real burdens upon the Estate, and the low Rates of Victual, would not extend to satisfie the same: Seing he was obliged to pay out of the first and readiest.

D. 100. *Lady Burgie contra Strachan. eod. die.*

**A** Base Infeftment given by a Husband to a Wife, was sustained after the Husbonds decease, as publick and cled with Possession, albeit the Husband was not in Possession the time of granting the Right: In respect, either he, or others by redeemable Rights and Tacks given by him, came in Possession thereafter.

D. 101. *Fyffe contra Daw in Perth. 6. Novemb. 1667.*

**A** Burgess in *Perth*, having put his Son with a Neighbour to be his Prentice, and the Boy having diverted from his Service, the Father was pursued for Damage and Interest sustained by the Master, who did refer to the Fathers Oath his absence and diverting: In which Process, the Father having declared with a Quality, That the Master had beaten and put away his Son.

The Lords Found, The Quality being *super facto alieno*, did resolve in an Exception, which he should have proponed, and cannot be proven

ven by his own Oath: And yet though the Process was a Suspension, wherein there had been Litiscontestation, as said is; *The Lords*, did give a Term to prove the said Quality. Procurators *Fyffe alter Chambers*.

D. 102. Duke and Dutcheſs of *Monmouth* contra *Scot* of *Clarkingtoun*. 12. Novemb. 1667.

**R**equiſition being made by the Duke of *Monmouth* and his Lady, to Sir *Laurence Scot* of *Clarkingtoun*, for a Sum of Money; But the Notar having deceaſed before his Inſtrument of Requiſition was extended. and there being only a Minut of the ſame unſubſcribed, the ſaid Duke and Dutcheſs purſued *Clarkingtoun* for extending and making up the Inſtrument; and craved that *Clarkingtoun* and the Witneſſes might be examined to that purpoſe: and that upon Probation, that the Requiſition had been made conform to the ſaid Minut, an Inſtrument under the Clerk Registers hand ſhould be equivalent to an Inſtrument.

*The Lords* Reſuſed the ſaid Deſire, in reſpect the ſaid Minute was neither ſubſcribed by the Notar, nor in his protocol. *Lockheart* alter *Spotswood*.

And that Requiſition and ſuch *Actus Legitimi* cannot be proven but by Inſtruments perfected as to all neceſſary Solemnities, at leaſt the Minutes of the ſame under the Notars hand. And tho the Debtors or Party concerned may know ſuch Deeds were done *de facto*; they may be ignorant and are not obliged to declare, whether they were Legally done or not.

D. 103. *Allanus Henderſon* contra 14. Nov. 1667.

**Q**uia facti ſpecies (quæ ſequitur) dubia & perplexa, & de ea diſſeptionis in apicibus Juris eſt, eam & argumenta ultro citroque adducta ex Jure Civili, Juris iſtius Idiomate, Latine viſum eſt ſubjicere. Sequitur ſpecies facti.

*Ninianus Henderſon* nauta & incola villæ, quæ vulgo nuncupatur *Sallina Preſtoniana*, peregre profeſſurus; nec immemor periculorum, quibus nautæ & navigantes obnoxii ſunt; de rebus ſuis & patrimonio (quod exile fatiſ erat) in prædiis urbanis, & quibuſdam tenementis in villa iſta ſitis, diſponere ſtatuit: quod fecit Chirographo ſeu Inſtrumento, ſed adeo informi & Styli ancipitis & dubii, ut acerrimæ Diſputationi anſam præbuerit, utrum Teſtamenti & Donationis mortis cauſa, an inter vivos Jure cenſeri debeat: Ejus Clauſulas & tenorem breviter perſtringam: Cum eſſet cœlebs, nec liberos, nec fratres haberet, ſed ſororem unicam, eam præteriit, nulla de ea mentione facta: & præfatus de profeſſione ſua & de morte; quod haud Ignarus eſſet ea nihil eſſe certius; nec minus hora & tempore quo eſſet obeunda nihil eſſe incertius: Ideo amore & gratia ductus, quo proſequitur *Allanum Henderſon* *Niniani* Patruſ ſui filium, nominat (ipſa verba) & conſtituit dictum *Allanum* hæredes Executores & Assignatos ſuos, ejus hæredes & Succellores & Donatarios in rem ſuam irrevocabiliter; In & ad ſua Tenementa domos et terras arabiles jacentes in villa dicta; & ad omnes alias terras hæreditates & bona quæ in poſterum ad ſeſe pertinere contigerint; cum plena poteſtate dicto *Allano* ſuiſque prædictis, ſi ipſum mori nec in patriam redire

"redire contigerit, intrare & confirmationem obtinere a Domino directo  
 "& superiore, in & ad dictas terras & Tenementa, iisque frui & possidere;  
 "Transferendo in dictum *Allanum* ejusque prædictos, omne jus suum tam  
 "proprietatis quam possessionis; & excludendo agnatos & necessarios suos,  
 "& proximos cognatos quoscunque; cum cessione omnium Instrumento-  
 "rum & Evidentiæ dicta Tenementa & Terras concernentium: *Refer-*  
 "*vando* tamen (iplissima verba, quæ notanda) sibi ipsi tantummodo,  
 "post suum in patriam reditum, revocare, rescindere, irritare, &  
 "annullare præsentis literas tanquam nunquam fuissent; & dictis Terris  
 "aliisque uti & pro arbitrio & libitu suo de iis disponere: cum Clausula  
 "Registrationis. *Ninianus* ex protectione Redux in patriam, diem  
 "obit. Ex eo Instrumento egit ad implementum prædictus *Allanus*, ad-  
 "versus sororem & hæredem dicti *Niniani*; Excipiebat Soror, & pro  
 "ea Advocati arguebant, eam non teneri sed absolvendam his argumentis;  
 "Testamentis, Legatis, & mortis causa Donationibus, res mobiles tantum dis-  
 "ponuntur, nec ex omnes sed quæ Executoribus Relictæ & liberis cedunt;  
 "libata & subducta ea parte mobilium, quæ Jure hæreditatis hæredi, mori-  
 "bus nostris, relinquitur: Nec satis esse aliquem tum velle tum posse de  
 "rebus suis disponere, nisi accedat modus habilis; forma enim in civilibus  
 "& concessionibus dat esse rei: cum igitur tenore Instrumenti perpenso;  
 "in comperto sit, Testamentum, saltem ei affinem donationem mortis  
 "causa esse; sequitur eo Testamento de prædiis suis frustra nec modo habi-  
 "li disposuisse, & donationem inanem & inefficacem esse: Quod autem  
 "Instrumentum & Donatio in eo contenta, Testamenti & Donationis  
 "mortis causa Jura censeretur, facile evinci, tum ex præfatione & ver-  
 "bis narrativis; tum ex clausula dispositiva, nec non & ex clausula & ver-  
 "bis Executionis: Ex præfatione liquet, donationem concessam non tan-  
 "tum contemplatione verum etiam commemoratione mortis, & verbis in  
 "Testamenti & ejusmodi donationibus Testamentariis solennibus; nec  
 "non ex ipsis concessionis verbis constare, donatorem voluisse testari vel  
 "mortis causa donare; nominat siquidem dictum *Allanum* ejusque præ-  
 "dictos, suos hæredes & successores; nominare autem & constituere hæ-  
 "redes & Successores sunt verba penitus Testamentaria; Et in Donatio-  
 "nibus inter vivos nec apta nec usurpata: Accedit, quod cum definitio Do-  
 "nationis mortis causa sit, Cum aliquis vult se magis quam Donatarium,  
 "eumque potius quam hæredem rem suam habere; eam disponentis vo-  
 "luntatem fuisse certum est ex clausula executiva, & potestate dictis bonis  
 "& terris fruendi post mortem suam; aliis cognatis & proximiori-  
 "bus submotis & exclusis: Cum Donatio aliqua conceditur metu & in-  
 "tuitu periculi imminentis, eo cessante, & donante incolumi & superstiti,  
 "cessat & evanescit donatio; Donatio autem, de qua agitur, facta est metu  
 "periculi ex navigatione periculosa, imo sub conditione si Disponentem  
 "mori contigerit; cum igitur in patriam redierit, nec conditio exstiterit,  
 "consequens est Donationem inanem & irritam esse. Dato Donationem  
 "inter vivos, & puram esse ab omni conditione suspensiva; extra omnem  
 "Quæstionis aleam est, eam factam sub conditione Resolutiva; Siqui-  
 "dem potestate concessa ex donatione, Terris aliisque donatis fruendi &  
 "possidendi, si Donantem sine reditu in patriam mori contigerit; a con-  
 "trario sensu sequitur, sin in patriam incolumis redeat, rebus donatis nec  
 "frui nec possidere licere; sed donationem nullam, existente conditione  
 "sub qua resolvitur Donatio ista: Et si supponatur inter vivos nec sub con-



“ ditione suspensa nec resoluta; sine dubio a Donatore revocari potuit;  
 “ & Revocata est post reditum; & probaturos recipiebant Rei, Instru-  
 “ mentum donationis penes donantem repertum fuisse: Instrumentum  
 “ autem penes Debitorem aut concedentem repertum, censetur liberatum  
 “ aut revocatum.

“ Quod nunc sit penes actorem, non sequi, ei rursus a donante traditum,  
 “ & iterata Traditione donationem Reviviscere; nisi doceatur quando  
 “ & quomodo ad eum pervenerit; fieri enim potest ut tempore mortis  
 “ penes donantem fuerit, & actoris dolo substractum.

“ Pro Actore Replicabatur, Instrumentum dispositionis & donationis,  
 “ inter vivos Jure censendum; & actionem ex eo efficacem esse; mentem  
 “ donantis fuisse donationem concedere irrevocabilem si peregre mori  
 “ contigisset; sin rediisset revocabilem; hoc casu potestatem revocan-  
 “ di retinuisse, sed ea haud usum; nec enim Instrumentum aut scriptum  
 “ exstare quo Testatus sit donationem revocari: menti exprimendæ verba  
 “ haud defuisse satis apta, & dispositioni inter vivos idonea; donasse sc:  
 “ irrevocabiliter & Jus suum omne tam possessionis quam proprietatis trans-  
 “ tulisse, cum potestate fruendi & possidendi: & cessio evidentiæ, &  
 “ Registrationis clausula sunt naturæ penitus Heterogenæ & a Testamen-  
 “ tis alienæ: Si Donator revocatione facta peregre decessisset revocatio-  
 “ nem Actori minime obfuturam; Si Actor superstitie donatore mortuus  
 “ fuisset donationem haud inanem, sed hæredibus Actoris efficacem fore:  
 “ Ea argumenta concludere donationem, Testamenti naturam haud sa-  
 “ pere; cum in Testamentis ambulatoria sit voluntas & præmoriens do-  
 “ natario aut legatario evanescunt Legata & Donationes: haud diffiteri  
 “ donationem istam quibusdam clausulis, donationi mortis causa affinem  
 “ videri: Sed quod de *Hermophrodito* Jure cautum est, haud inepte &  
 “ hic accommodari, & quod prævalet inspicendum.

“ Ad argumenta pro Reo Respondebatur: Ad primum, haud incongruum  
 “ esse mentis & valetudinis compotem, & in legitima potestate constitutum,  
 “ uno & eodem Instrumento, de rebus suis tam mobilibus quam immo-  
 “ bilibus disponere posse; si quis enim peregre profecturus Testamentum  
 “ condat, & Executores instituat, et eodem Testamento de terris suis  
 “ disponat per verba formalia & idonea, addito mandato de Resignatio-  
 “ ne facienda, & Sasinæ præcepto: Sasinâ & Resignatione secuta, eo ca-  
 “ su, si dicas nec Testamentum nec Dispositionem valere, absurdum erit  
 “ quæ seorsim licitæ sunt rerum suarum donationes, illicitas fieri, quod  
 “ simul uno Instrumento celebratæ sunt: Si dicas Testamentum tan-  
 “ tum valere, ratio reddi non potest, cur Testamentum & mobilium do-  
 “ natio magis valeat, quam Dispositio & rerum immobilium Donatio, cum  
 “ in hac non minus concurrant potestas & voluntas, & modus & conceptio,  
 “ idonea & solennis: Superest igitur utrumque valere. Præterea respon-  
 “ detur, falsum esse quod asseritur, donationibus mortis causa de terris  
 “ & rebus immobilibus disponere haud licere; cum nihil frequentius sit  
 “ contractibus & donationibus, quibus, proximioribus exclusis, hæredes alii  
 “ (& ut loqui solemus) *Talia* & Provisionis instituuntur.

“ Accedit, quod Donator Actorem Donatarium constituerit; & verbum  
 “ istud proprium sit donationis inter vivos; nec officit quod etiam hæ-  
 “ redem & successorem nominarit, *cum utile per inutile non vitiatur*. Ad  
 “ Secundum Respondetur; Dato, Donationem esse mortis causa, non se-  
 “ quitur

“quitur invalidam esse; superius enim dictum est in contractibus & obligationibus de successione *Tallia*, de rebus immobilibus & prædiis nos quotidie disponere: eas autem donationes esse mortis causa, patet ex prædicta Definitione mortis causa donationis; & quod omnes de successione contractus, mortis contemplatione & plerumque non sine mortis commemoratione fiant, & effectum post mortem sortiantur, & in iis ambulatoria sit voluntas, nisi accedat pactum de non revocando. Ad Tertium Respondetur, falsam esse Propositionem; nec enim cessante causa impulsiva cessat effectus; nec qui periculo imminente mortalitatis admonitus, Testamentum condidit; si periculum effugerit aut elatus fuerit, eo minus in voluntate eadem perseverasse censetur; & testatus discedit nisi revocasse constiterit. Ad Quartum Respondetur, Dispositionem redditu eveniente, haud nullam aut irritam esse, sed revocabilem, id ex eo demonstrari; Quod sibi soli & tantummodo reservaret, si domum rediret, potestatem revocandi; si enim inanis & caduca fieret Donatio, in casu redditus, quorsum ista potestas & sibi soli reservata, revocandi donationem, quoad omnes, ipso conditionis eventu extinctam & revocatam. Ad Quintum & Sextum Respondetur, & Negatur, instrumentum post Donatoris redditum penes eum esse; & penitus supervacuum disceptare an penes eum fuerit, cum nunc penes actorem sit, & sibi a donatore traditum, nec necesse est docere quomodo & quando ad se pervenerit.

“*Senatus* Interlocutus est, Donationem istam Testamenti naturam haud sapere, sed validam & efficacem esse: Sed si constiterit & probatum fuerit, penes donantem instrumentum post ejus redditum fuisse, tunc revocatum & irritum esse.

“An autem, eo quod penes actorem nunc sit, a revocatione discessum sit & reviviscat Donatio, interloqui sustinuit: & ulterius inquirendum censuit quando & quomodo ad actorem pervenerit.

D. 124. *Whitehead* contra *Straiton*. 14. Novemb. 1667.

**R**obert *Whitehead* of *Park* pursued *John Straiton* Tacksmen of the *Park* of *Holy-rood-house*, for the price of a Horse put in the said *Park*, to be pastured for 4. *shil.* per night; which after search cannot be found:

*It was Alledged*, That by a Placard affixed upon the Gate of the *Park*, It was intimated, that the Keeper of the *Park* would not be answerable for any Horses put therein, although they should be stolen, or break their Neck, or any other Mischief or Hazard should overtake them. *It was Replied*, That by the Law *Nauta, Caupones, &c.* the Keeper *ex conducto* is lyable; unless it were alledged, That it had been expressly agreed, that he should not be lyable; or at the least, that it was known to the Pursuer, that such a Placard was affixed, when he put in his Horse.

*The Lords*, Before answer, ordained the Reporter to enquire, and hear the parties upon the terms of the Agreement, when the horse was put in: whether it was told or known to the pursuer, that the keeper would not be answerable. *Castlehill* Reporter.

D. 105.

D. 105. Gardiner contra Colvil. 16. Novemb. 1667.

**I**N an action Gardiner contra Colvil; the pursuer being objected during her Husbands absence out of the countrey, and when it was supposed he was dead.

*The Lords* sustained the pursuite; Though the time of the adviseing the probation, It was offered to be proven that he was living: and did declare, that albeit the Husband were at the Barr, they would give the Wife the benefite of *Juramentum in litem*, in respect of the wrong done by the Defender, and the particulars and quantities could not otherwise be proven. Actor *Longformacus* alter *Wallace*. *Castlehill* Reporter.

D. 106. Trotters contra Lundy. 20. Novemb. 1667.

**T**HE Children of George Trotter in *Fogorig* being confirmed Executors to their Sister *Isobel Trotter*, pursued *James Lundy* Cautioner in a Bond for *James Trotter* of the East-end of *Fogo*, for the Sum thereinconteined: *It was Alledged*, that the said *James* being Heir to his Grand-father *Alexander Trotter* in the East-end of *Fogo*, and the said *George* Son to the said *Alexander* and Executor to him, they did transact together that the Movables belonging to the said *George* as Executor should remain with the Heir; and the said *James* and the Defender as Cautioner did for the cause foresaid grant the said Bond blank in the Cteditors name where in the said *George* filled up the name of *John Trotter* in *Chester* his Brother; and procured from him an Assignment for the said *Isobel* his Daughter; And that thereafter upon a Submission betwixt the said *George* and *Alexander Trotter* Son to the said *James* granter and principal Debitor in the said Bond, The Arbiters ordained the said *George* to give back to the said *Alexander* the said Bond, and Assignment, with a Discharge thereof; and therefore the said *Isobel* being in *familia paterna*, and the said Bond and Assignment being taken and procured as said is, by the said *George* the Father in favours of the Daughter who hath no visible Estate or means to acquire any such Right, he was still master of the same: And it being ordained to be Discharged (as said is) the said Debt is Extinct. *It was Answered*, that the Bond being filled up and Registered in the name of the said *John Trotter*, and the samen being Assigned, and the Assignment in favours of the said *Isobel* intimat; and after her decease, her Executors having confirmed the said Debt; all before the said Submission; her Father could not by the Submission or any other deed of his, Evacuat the said Right Established in the person of the said *Isobel* and her Executors: And as to the Practique betwixt *Monimus* and *Pittarro*, whereupon the Defenders alledge; it doth not quadrate to the Bond in question, it being never delivered but depositat in the Uncles hand, Mother Brother to the Child; and in the same case *It was Found*, That the Father could not retract a reall Right made in favours of his Child and Heir: And here there is *Eadem Ratio*.

*The Lords Found*, That the Father being Master of a Bond or Right, whereupon nothing followed, being granted by himself; may throw it in the fire, and may consequently Discharge it: But the said Right being made publick, and compleated by the delivery, and which is equivalent, by  
some



some publick deed, by Infeftment if it be Heretable; or by Affignation intimated, or confirmed Testament, if it be Movable; he could not there-after Retreat or prejudice the same: And repelled the Defence in Respect of the Answer. *Hackertoun* Lord Reporter. Mr *Thomas Hay* Clerk.

D. 107. *Pollock contra Pollock. eod. die.*

*John Pollock* having granted a Bond of 5000 Merks to *James* his second Son of the first Marriage; The said *James* intended and pursued for payment both *Robert* eldest Son of the same Marriage, Heir of Line, and *John* eldest Son of the second Marriage, and Heir of Provision, as charged to Enter Heir *respective*: It was alledged for the Heir of the first marriage, that he offered to renunce: And for the Heir of Provision, that the Heir of Line ought to be first discussed by adjudication; and condescended upon movable Heirship, which might be adjudged: *It was Answered* for the Heir of Line, that his Father, having provided him, had taken from him a Renunciation of all that could belong to him as Heir, So that he could have no Right to the movable Heirship, which, in respect of his Renunciation, would be considered as other movables and fall under Execution: *It was Replied* for the Heir of provision, that by the Renunciation, the Heir of Line had renounced his kindness, to the effect his Father might have power to dispose of the Heirship; but his Father not having disposed thereof, the Right returned to the Heir of Line again, the Renunciation being in favours of him and his Heirs; as in Renunciations of that nature as to Lands, if the Father does not dispose of the same, they will notwithstanding belong to the Heir. Some of the *Lords* thought, there should be a difference betwixt Lands and Movable Heirship; In respect the Right of Lands, whereof the Father died infeft, cannot be Settled in the person of any other but the Heir, who therefore ought to have Right notwithstanding of the Renunciation: But the Movables which should fall under Heirship by the Renunciation of the Heir, cease to be Heirship; and may be confirmed as other Movables: Others Thought, that the Effect of such Renunciations should be the same as to Movables and Lands; the Fathers intention being one and the same for both; and therefore, as the Right in the construction of the Law returneth to the Heir of the Father, who doth not otherwise dispose of his Lands; there is the same reason as to movable Heirships: And as to the pretence foresaid, it is of no weight, seeing if it were the Intention of the Father, that by such Renunciations the Son should be denuded, without Return, though the Father should not dispose of his Lands; the Son may be pursued and forced to denude himself, that his Renunciation may be effectual, in favours of the nearest of Kin.

The *Lords* before answer ordained the Renunciation to be produced, that they might consider the Tenor of it.

D. 108. *Tacksman of the Custumes contra Greenhead.*  
*Eod. die.*

THE Custums of the Borders being set in Subtack to *Greenhead* and others, by the Tacksman of the haill custumes of the Kingdom: *Greenhead* is pursued as representing his Father one of the Subtacksmen, for  
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the dutie the year 1650. *It was alledged*, That the Subtrack was altogether unprofitable, upon the occasion of the *English* Invasion; so that Beasts and other Goods were not imported, nor Exported that year, as they had been in use formerly: *It was Answered*, that albeit in *prædiis Rusticis*, in case of Sterilitie, Vastation, and such other Calamities that cannot be avoided, There may be abatement craved & *Remissio Canonis*; yet in this case the Subject being *conductio rei periculosa* & *Jactus Retis*, the Subtracksmen ought to have no abatement, and are in the same case as Tacksmen of Salmond fishing, who will be lyable for the duty, albeit no profit arise to them.

*The Lords Found*, That Subtracksmen should have abatement: But the Question being most, *Quatenus*, and concerning the proportion; because, though the Subtracksmen had undoubredly loss, yet it was not Total; there being some Commerce betwixt the Kingdoms for that year, some Moneths. *It was Found* in end, upon hearing of Parties, that the half of the Dutie should be abated. *Actores Lockhart & Cuninghame Alteri Sinclair. Mr Thomas Hay Clerk*:

The Law is very clear *ff Locati*; and the Doctors upon that Title; not only in *prædiis* but in *conduccione vectigalium*, and the like; in case of an insuperable Calamity, *remititur Canon & merces*; but they are not so clear as to the *Quatenus* and proportion of the abatement, when the detriment is not Total: But it is just, the abatement should be proportionable to the loís: And accordingly *The Lords decided*.

D. 109. *Justice Clerk contra Lambertoun* 23. Nov. 1667.

IN the case, the *Justice Clerk contra Lambertoun*, the probation aient the value and worth of the Woods pertaining to the *Justice Clerk*, and cutt and intrometted with by *Lambertoun*, being advised; It was considered and represented by some of the Lords, that had been Commissionated to examine the Witnesses adduced by both parties, being allowed to have a joynt probation, that the probation was dubious; the Witnesses for the Pursuer declaring too highly, and the Witnesses for the Defender too low as appeared: And that the Subject of the Question not being *de re* which is the proper Object of Sense, but *de rei valore qui cadit sub Judicium & Intellectum*; The Testimonies of the Witnesses are not *de rei veritate* but *de credulitate & opinione*; and therefore are not *numaranda sed ponderanda*, according to the circumstances both of their own quality and the quality of the Declaration, whether they have declared *verisimilia*, and whether *animose* and such like; and whether they have given a probable reason of their knowledge: That in this case, the Witnesses that have deponed most to the advantage of the Pursuer are his own Tennants; and one of them a Smith & his Officer: that they give the reason of their Knowledge, that they dwelt in the bounds, which is not sufficient, unless they had been *periti* and Conversant about the matter of Woods, and the Buying and the Selling and the valuing of the same: That some Witnesses for the Defender had given their Judgment upon oath as strongly and pregnantly as they, though they be not so many: So that the probation at best is but dubious, and *in dubiis minimum sequendum*; at the least the Lords have a latitude to found their Judgment upon the Testimonies of both *cum temperamento*, and without adhering percisely to either.

*The*

*The Lords Found* nevertheless by plurality, That they should have respect to what had been proven by the most part: And accordingly Decerned.

D. 110. *Rankin contra Skelmorlie and Dunlop. eod. die.*

**I**N a double poiding at the instance of the Lord *Melvil*; there being a Competition betwixt two Creditors of *Antonia Brown* Daughter and Heir to Sir *John Brown*:

*The Lords* preferred *Skelmorly* the first Arrestor, Though *Rankin* had obtained a Decreet to make forthcoming, and had compleated his Diligence; and alledged, that an Arrestment is but an inchoate Diligence, and doth not hinder any other Creditor to compleat, and do more exact diligence by poiding, or by a Decreet to make forthcoming, which in Debts, and in *nominibus* are equivalent. The reason of the Decision was, that *Skelmorly* had not only Arrested but had intended a pursuite before the Lords to make forthcoming before *Rankin*; But Proccesses before the Lords being more tedious, and the Pursuer not Master of Calling, *Rankin* had taken advantage by obtaining a Decreet before the Sheriff, in the interim.

D. 111. *Hay contra Drummond. 26. Novem. 1667.*

**I**N a Reduction *Hay* of *Haystoun* contra *Drummond* and *Hepburn*; A *Seafin* being called for; The Defenders having alledged, that the same being Registrate, and they condescending upon the Registration, the pursuer should Extract it himself.

*The Lords* did debate amongst themselves, whether the Defender should be obliged to Extract and produce the *Seafin*: Some were of the opinion, that there is a difference betwixt Decreets and Registrate Bonds and such like; and betwixt *Seafins* and Charters, which being the Defenders own Evidents and the principals not being in the Registers, they are presumed to have them; and if they have them not, ought to Extract them: Others thought, that seing Extracts do satisfie the Production in Reductions; If the Defenders have neither Principals nor Extracts, and be content to make Faith thereupon, it were hard they should be at the Charge to Extract them, in order to a Procces against themselves. *The Lords* did nothing upon the Debate.

*The Lords* did resolve, and caused intimate to the Advocates, That hereafter they would only give two Terms in Reductions, and three Terms in Improbations.

D. 112. *Dalziel contra eod. die.*

**T**HE Minister of *Prestonhaugh*, Mr. *John Dalziel*, pursued for the Teinds of *Lanton*, upon his presentation to the said Kirk and Teinds Parsonage and Vicarage: It was Alledged, no procces, unless he were presented to be Prebendar, seing the said Kirk is a Member of the Collegiate Kirk of *Dumbar*; and cannot be made appear to be dissolved, and Erected in a several Rectory.

*The Lords Found*, That being presented to be Minister at the said Kirk, and to the Teinds, which are the patrimony of the Prebendar; it is equivalent



lent, as if he were presented Prebendar: As when there is a presentation to a Kirk, which is a Parsonage, and to the Teinds, the Minister will have Right, though he be not presented to be Rector or Parson.

D. 113. E. of *Lauderdale* contra *Vassals* of *Musselburgh*.  
5. Decem. 1667.

**I**N a Reduction and Improbation at the instance of the Earl of *Lauderdale*, against the Vassals of *Musselburgh*, and in special Major *Biggar* and others Heretors, and possessors of the Lands of *Hill*.

*The Lords Found*, That the Major having produced a more eminent progress, and which he alledged would exclude the pursuer; no Certification could be granted *contra non producta*; The Defender not being obliged to show any other Writes, until these which are produced be discussed. *The Lords Found* also, That the Defenders are not obliged to declare, that they will use no other Writes than these which are produced: The only difficulty being, that the reason of Reduction could not be disputed, until the Production be closed; and if the Writes produced should be improved or reduced, the Pursuer would be put to a new process of Improbation; or return and crave Certification after Dispute *in Causa*, which is incongruous in Form.

*The Lords* were of Opinion, that in the same Process the Pursuer after the discussing of the Writs produced, might thereafter crave Certification *contra non producta*.

D. 114. *Fountain* contra *Maxuel*. eod. die.

**A**lbeit *the Lords* are tender in Exhibition of Writs; unless it be proven, that the Defenders had the same the time of the intenting of the Cause; or had fraudfully put the same away before; which is *difficilis probationis*; Yet in an Exhibition at the instance of *Fountain* against *Maxuel* of *Nethergate*, they decerned to exhibit, albeit it was not proven that the Defenders had the Writes, at, or since the intenting of the Cause: In respect it was proven, the Defender had meddled with the Writes being in a Charter Chest; and had offered to Transact concerning the same; and so was presumed to have put them away fraudulently: There being a great difference betwixt a transient having of Writes, and a down right medleing and Intromission; which, being proven, though it be before the intenting of the Exhibition, doth oblige the Intrometter to be answerable for the same.

D. 115. *Collector* of the *Taxation* contra the *Parson* of *Oldhamstocks*. 6. Decem. 1667.

**I**N the Case, *The Collector* of the *Taxation* contra the *Parson* of *Oldhamstocks*; a Question was moved, whether the Successor in the benefice be Lyable for the *Taxation* due by his Predecessors, his Patrimony consisting most of Teinds: But was not decided at this time.

D. 116.

D. 116. Mr. Rodger Hog contra The Countess of Home.  
11. Decemb. 1667.

**A**N Inhibition being served upon an Obligation to warrant; A Reduction was thereupon sustained, though it was alledged there was neither Decreet of Eviction, nor Liquidation of distress; the pursuit being only a Declarator, and the Decreet being only effectual after Eviction and Liquidation; which accordingly was declared by the Lords.

D. 117. *Inter Eosdem. eod. die.*

**B**ETWIXT the same Parties: It was alledged, that the Defenders Right was ratified by a Creditor, who had a Comprising expired; so that the pursuer had no interest to question the Defenders Right: *It was Answered*, That the pursuer desired only such Right as was after the Inhibition to be reduced, without prejudice of any other, which he could not nor was obliged to debate *hoc loco*.

*The Lords*, notwithstanding *Found* the Alledgance Relevant.

D. 118. Hamilton contra Lord Belhaven. 13. Decem. 1667.

**R**Obert Hamilton Clerk, pursued the Lord and Lady Belhaven to hear and see it declared, that a Minute betwixt him and them concerning the Tenor and Articles Lybelled, is null; the clause irritant thereinmentioned being committed.

*The Lords* refused to sustain the pursuit; unless the Minute were produced: Albeit it was alledged there could be no prejudice, in respect a Minute of another Tenor could not be prejudged: and a Minute of that Tenor Lybelled, should be declared void upon the reason Lybelled.

D. 119. Riach contra *Eod. die.*

**A**FTER Litiscontestation upon an Exception of payment; the Defender, who was pursued as Lawfully charged to enter Heir, Desired to be admitted to renounce; which was refused; because by the proponing the Defence, *Gesserat se pro herede*: And Litiscontestation is a judicial Contract.

D. 120. Rannolph Davidson contra Richardson *Eod. die.*

**A**Ship being declared pryfe, Because the Loadning of Salt belonged to a Frenchman; the Skipper and Steersman having declared upon oath that the Loadning was taken in at the *Rotchel* upon the account of the said Person. The adjudication was quarrelled by a Reduction, upon diverse reasons; and in special these, that the Deposition of the Skipper and Steersman were forced and extorted from them; and that it was offered to be proven and that it did appear by diverse Letters, Certificats, and Documents produced, that the Loadning did belong to the Owners of the Ship who were Citizens of *Dantzick* and *Hamburg*, and were not the Kings Enemies.

*The Lords* in this Process *Found*, that the Owners may be heard to reduce the Sentence upon reasons omitted by the Skipper. 2. It being debated amongst

mongst the Lords whether the Skippers Declaration should so prejudice and conclude the Owners, that they should not be heard thereafter to prove that the Loading belonged to them: Some thought it hard, that the Skippers fraud or mistake should prejudice the Owners: But because in the case, there was no ground to presume that the Skipper and Steersman did intend to prejudice or wrong the Owners; and the Writs and Certificats produced were all after the Seizure; and the Letters, which were of anterior dates might have been made up, and were all from Persons concerned; and there were Documents found in the Ship that could clear that the Loading did belong to the Owners.

*The Lords* Sustained the Sentence, unless the Pursuer would qualifie *Foroe and Violence*, and that the Depositions were Extorted. *Hay Clerk.*

D. 121. *Homes contra Paterson* 17. Dec. 1667.

*IT was Found*, that the Attester of the sufficiency of a Cautioner, being pursued for the Debt, the Cautioner being distressed and discusst and not Solvent; and the Attester having alledged that he offered to prove that the Cautioner was then the time he became Cautioner, *habitus & reputatus Responsal & idoneus* as to the Debt: The alledgance is relevant, and the Attester no further lyable.

D. 122. *Sir Thomas Nicolson contra the Laird of Philorth.*  
18. Dec. 1667.

*PHilorth* elder, being pursued as representing his Grand-Father for payment of a Debt due upon Bond granted by the Earl *Marischal* and his Grand-Father as Cautioner: *It was Alledged*, that the Bond being Dated above fourty years ago was prescribied: *It was Replied*, that interruption had been made by payment of the Annualrents by the principal Debitor: *It was Answered* it was prescryved as to the Cautioner, there being no interruption by any Document or pursuit against him, or payment by him.

*The Lords* repelled the Defence in respect of the Reply: and *Found* that the ground of prescription as to personal actions being *odium and negligentia non perentis*, that it doth not militate in this case, the Creditor having gotten Annualrent; so that he cannot be said to be negligent. *Lockhart, alter Cuninghame.*

D. 123. *Gilespie contra Auchinleck.* Eod. die.

*Mary Williamson* Lady *Cumblidge*, having Right not only of Liferent but also to the Fee of the said Estate by Comproysing; and being about to Marry with *Patrick Gilespie* her second Husband: for settling and preventing Questions betwixt her Children and her Husband, she did Dispose the Fee of the Lands to her eldest Son with the burden of 5000. Merks to be payed to her second Son at his age of Twentie one years; and to Entertain him in the *Interim*: And at the same time her eldest Son did grant and sett a Tack to the said *Patrick*, for a year after his Mothers decease if he should survive her, of her Liferent Lands reserved in the Disposition, mentioning their purpose of Marriage, And that he was to stock the saids Lands, and that his Wife might die before him; upon which

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considerations the said Tack is sett : At the same time, the said *Mary* did privatly dispone her Liferent in favours of her second Son *John Auchinleck*, who intended a pursuit against her and her said Husband for the Maills and Duties of the Lands for diverse years : *It was Alledged*, that the said Right being a privat latent Right, the Defender ought to be free of by-gones as being *bona fide Possessor*, by virtue of his Wife's Infeftment, and his *Jus mariti* : *It was Answered*, That he and his Wife are *Eadem persona*, and she being his author, cannot pretend that they possessed *bona fide* in prejudice of a Right made by her self.

*The Lords Found* the alledgances relevant.

It was further alledged, that the Disposition made to the Pursuer was most fraudfully granted in prejudice of the Defender after Treatie of the Marriage, and the said publick Transactions in order thereto; Which were Equivalent to, and in lieu of a Contract of Marriage; the Wife having no other thing besides to dispose of besides her Liferent, to which the Husband has Right *Jure mariti*; so that a Contract was not necessary as to that : And that the said Right was retained by the Mother, and not delivered until she was Married; at which time she could not prejudice her Husband, and that the Defender had a Reduction depending upon the reasons foresaid.

*The Lords Found* the alledgance relevant : And found that an Assignment not intimat and not being made for an onerous Cause, could not prejudice the Husband, having by his Marriage a publick Right Equivalent to an Assignment, and therefore assailed.

It was not considered whether the Right was delivered or not, being found latent as said is.

D. 124. *Wilson contra the Magistrates of Queensferry* 2. January. 1668.

*Archibald Wilson* being charged to accept the Office of a Baillie of the Town of *Queensferry*, Suspended upon the Act of Parliament, *Jam. 3. Parl. 5. Chap. 29.* whereby it is statute, that Magistrates within Burghs should not be continued longer than a Year; and subsumed that he had served the preceeding two Years.

This case being Reported, *The Lords Found*, the Reason Relevant.

And albeit the Act of Parliament be not in observance, specially in *Edinburgh*, The present Provost having been in that place diverse years, yet the Ambition and unwarrantable practice of thote who violate the said Act, and others made to that purpose; ought not to prejudice others who are most sober, and claim the benefite of the same,

D. 125. *contra* 3. January. 1668.

A Wife provided to an Annualrent in Victual out of certain Lands by her Contract of Marriage, did renounce the same; and thereafter was Infeft in an Annualrent out of other Lands: And upon the said last Infeftment a Procefs being intended for pointing of the Ground: *It was Alledged*, that the Seafin was null being alledged to be given by a Husband *propriis manibus*, and the Assertion of a Notar without any precept or warrand in Writ : *It was Answered*, That the Marriage with the Relicts

licts Renunciation of her former Right, and her Contract of Marriage, being all produced, are sufficient Adminicles to sustain the same.

*The Lords* enclined to favour the Relict, yet they found it of a dangerous consequence, that a real Right should depend upon the Assertion of Notars and witnesses: And the Question not being whether the Husband might or ought to have given his Wife the said Right, in recompence of of her former; But whether *de facto* he did the same, Seing the foresaid Writes having no relation to the Seasin, either as given or to be given, could not be Adminicles to warrand or sustain the same: And therefore before Answer, it was thought fit to enquire, if there had been any Decision in the like case; as was informed.

D. 126. Sir John Home contra *The Feuars of Coldinghame*.  
7. January. 1668.

**I**N a Process at the instance of Sir John Home of *Rentoun* Justice Clerk contra *The Feuars of Coldingham*: The Defenders offered to improve the Executions: *It was Answered*, They could not be heard, unless they would propone the said Alledgance *peremptorie*; but that the same should be reserved by way of Action.

*The Lords* for avoiding the multiplying of Processes, obliged them to propone the exception of Improbation *peremptoria*: But the same being *prior natura*, and competent to be proponed before any other *in meritis causa*; And yet being now proponed *peremptorie* in form of Process, being the last of Exceptions:

*The Lords* admitted the Defenders to propone their other Exceptions, and reserved that to the last place.

D. 127. *Eodem die.*

**T**HE Lords upon debate amongst themselves, Thought that the *Abbey* being His Majesties House, should not Exempt or protect any person against His Majesties Laws, and the Execution of Letters of Caption, and therefore Recommended to the Keeper of the *Abbey*, to put him out and not to shelter him there.

D. 128. *Forbes contra Innes*. 8. January 1668.

**I**N the Case, *Forbes contra Innes* and *Dalgarno*; *The Lords Found*, That a Wife having no Right for the time to Lands Disponed by her Husband; and having at the desire of the Buyer consented and sold her Right; if she thereafter acquire from another person a Right to the saids Lands, is not by her consent concluded, but may pursue and evict the Lands upon her Right; Her consent operating only, that upon any Right from her Husband, or then in her person, she cannot question the Right whereto she hath consented; And the Brocara that *Jus superveniens accrescit*, being to be understood of *Jus superveniens Authori*; whereas a Consenter is not Author. *Lockheart* alteri *Wedderburn & Thoirs*.

D. 129:

D. 129. Laird of Glen-orse contra his Brethren and Sisters.  
9. January 1668.

**A**Lexander Bothwel of Glencorse, having Disposed his Lands to his Eldest Son by Contract of Marriage betwixt his Son and his Wife, with absolute warrandice; And by the Contract the Tocher being payable to the Father, he did notwithstanding deliver Bonds of Provision to his other Children, which were of a date before the Contract, but not delivered diverse years after his Sons Marriage: The Eldest Son pursued a Reduction of the said Bonds, in so far as they may affect his Estate, or be the ground of a pursuit against him, as Successor *Titulo lucrativo post contractum debitum*: The Reasons of Reduction were, that the Bonds were not delivered the time of the Right granted to the Son; and that he could not thereafter do any Deed in his prejudice, and consequently, could not deliver the said Bonds, the delivery and not the granting being that which doth animate, and make the same effectual: *It was Answered*, That the Father being Tutor of Law to his Children, he having the Bonds for their use, is equivalent as if the Children had them, or that they had been delivered to them: And whatever may be as to a Singular Successor, they ought to be effectual against his Eldest Son, who is universal successor. *It was Answered*, That Contracts of Marriage, being not only in favours of the Son, but in the behalf of the Wife and Children, and with the Friends, are most solemn and favourable Transactions; *Et bona fides* is in them exuberant; so that upon no pretence, no Deed ought to be done by any of the Contractors *in fraudem*; And that the Father, if he had intended to have burdened the said Lands, should have burdened the Fee expressly with the same; that Provisions granted by Parents to their Children before they be delivered may be revoked; and that the Father by granting the Disposition in favours of his Son, had revoked the Bonds in question, in so far as they may trouble him.

*The Lords*, in respect it was proven, That the Bonds were not delivered till after the Contract, *Found* they could not be effectual against the Son, and Reduced. *Sinclair and Wallace*, alteri *Wedderburn & Lockheart*.

D. 130. Earl of Kinghorn contra The Laird of Udney.  
14 January. 1668.

**T**HE Earl of Kinghorn did Wadset to the deceased Laird of Udney the Barony of Balhaves, and the Sum due upon the Wadset being paid to Udney, he did by his Letter to the said Earl promise a Renunciation of the said Wadset to be granted by him: The Earl of Kinghorn as Heir to his Father having pursued the now Laird of Udney as representing his Father upon the passive Titles, and especially upon that, as Successor *Titulo Lucrativo*; in so far as he was Infeft in the Lands condescended upon acquired by his Father to himself in Liferent, and to the Defender in Fee; with power to the Father or his Assigney to redeem the same upon payment of three Pounds; And to Set, Wadset and dis-pone without his consent. *It was Alledged*, the Sons Right was prior to the said Letter, and that the Father did not make use of the said power: *It*



was Replied, That the Wadset was prior to the Defenders Right; yet this Right being qualified (as said is) the Father might have contracted Debts, and granted obligements after the said Right; and the Defender would be lyable to the same; seeing the Lands and the Fathers interest in the same being upon the matter a Fee and power to redeem and dispone, might have been comprysed for his Debt contracted after the said Right.

There being two questions in the case *viz.* Whether the Defender be lyable as Successor *Titulo lucrativo*, If it should be found that the Wadset was Anterior? 2ly. If the obligement shall be found to be after the Defenders Right, whether he would be notwithstanding Successor *Titulo lucrativo*, in respect of the quality and condition foresaid of the said Right.

The Lords repelled the alledgance, and Found, the Defender would be lyable as Sucesor, the pursuer proving that the Wadset was Anterior: As to the second question, the Lords thought it not necessary to decide, being of very great consequence, and deserving hearing. In *presentia*, seeing it was notour that the Wadset was before the Defenders Right: Yet we inclined for the most part to think, that when such Rights are granted or Purchased by Parents to their appearand Heirs, they should be lyable to all the Debts due and contracted thereafter; at least *secundum vires & in quantum Lucrantur*: And beside the abovementioned reasons, these may be urged 1. the Father having by such a reservation, not only a reversion, but in effect a Right of propertie, In so far as he has power to Dispone and wadset as if he were Fiar; if he should discharge the said Reservation his Discharge would inerr against his Son the passive title of Successor *titulo lucrativo*; having gotten thereby an absolute and irredeemable Right which he had not before; And therefore he not using the power competent to him by the said Reservation, being equivalent as if he had discharged the same, ought to operate the same effect. 2. Such a Right is in effect *Præceptio Hereditatis cum effectu* only the time of the Fathers decease, seeing before that time it is in his power to Evacuat the same; and therefore the time of the Fathers decease is to be considered so as the Son cannot be said to have Right or to Succeed effectually before that time, and so ought likewise to be lyable to the Debts contracted at any time before his Fathers decease.

D. 131. *Balmedie contra the Baillies of Abernethie.* 15. Jan. 1668.

A Decreet at the Procurator Fiscal's Instance of the Regality of *Abernethie* before the Baillie of the Regality, against the Weavers in the Town of *Abernethie*, for contraveining the Act of Parliament 1661 Anent the breadth and bleerching of Linnen Cloath; was suspended upon that reason, that the Bailies within the Town of *Abernethie*, were only Judges competent to the Inhabitants within the Burgh.

The Lords Found, that the Town being only a Burgh of Regality had jurisdiction within the same: And the Baillies jurisdiction is Cumulative and not Privative; unless they had it expressly by their Infestment Privative, and that in such cases *Locus est Preventionis*.

D. 132.

D. 132.

Parkman contra Allan: Eod. die

IN the late War betwixt his Majesty and Holland and Denmark, a Swedish Ship being taken by a Scots Caper and adjudged Pryze: A Reduction of the Admirals Decreet was pursued, upon diverse reasons; and in special this, That by the Treatie betwixt his Majesty and the Crown of Sweden, the Subjects of Sweden may traffique with their Alleys, though Enemies to his Majesty with freedom; and carry in their Ships Counterband Goods, Except such as are contained in an Article of the said Treaty, being for the most part Armes, and *Instrumenta Bellica*; and that the Goods in question which they had carried in their Ships to Holland, viz. Tarr and stock fish were not of that nature. 2. That when the said Ship was taken, there was none of the saids Goods aboard; and that it could not be declared Pryze upon pretence That immediatly before they had carried the said Goods to Holland; seing it is not unlawfull nor a breach of Treatie betwixt his Majesty and Sweden, that the Subjects of Sweden should continue the same intercourse and freedom of Trade they had formerly with their friends, though now the Kings Enemies: and if they carrie counterband Goods, the only hazard is that if they be deprehended carrying the same, They may be confiscated; conform to the Treatie with Sweden, bearing *si Deprehendantur*; which is Consonant to the custom of all Nations, and of the Admiralty of England. It was Alledged, that the Ship in Question should not have the benefit of the Treatie, having Served the Danes the Kings Enemies, and being fraughted and loaded with Tarr from Noraway upon the account of Danish Merchants, and with stock Fish which they had carried to Amsterdam: That it was expressly provided by the Treatie with Sweden, that they should not carry *bona hostium*; and that tho the Danes were not the Kings Enemies, yet Tarr and Stock-fish are Counterband, Tarr being a Material so useful and necessary for a Naval Warr; and that by the Treatie, *Commeatus* is counterband and Stock-fish falleth under the notion of *Commeatus*; and that by the Commission given by the Admiral to the Capers, they are empowered expressly to seize on Ships, not only while they have counterband Goods caryeing to his Majesties Enemies, but upon the return having sold and disposed upon the same. It was Replied, 1. That by the Law of Nations (which is clear from *Grotius de Jure Belli*) Goods that are *usus promiscui* both in Warr and Peace are not *vetita* and counterband; and two Nations being engaged in Warr with others that are at friendship with both are allowed libertie of Trade with either as to such Goods: And that Tarr is of that same nature, and *Commeatus*, except in the case of *portus clausus*, or *Civitas obsessa*, and from which *deditio* may be expected if not supplied. 2. His Majesties Declaration of Warr with Holland, bears, that Ships carrying counterband to Holland, if they be mett with carrying the same, may be seized; and that his Majesties Declaration, Emitted of purpose in relation to other Nations, should be considered as *lex Belli*, and not a privat and unwarrantable style of a commission given *periculo potentis*.

In this, many Points being debated, It was Found by the Lords, that Tarr is Counterband. 2. As to that Point, whether a Ship having carried counterband Goods to Enemies, may be seized upon in her return homeward, having sold and vented the same to the Enemies and not deprehended carrying the same; They thought fit to know his Majesties pleasure, and

and the custom of *England*; and a Letter was written to my Lord Secretary to that purpose. 3. The Ship in question, having carried counterband Goods to *Holland*, and having thereafter made a Voyage to *France*; and there having taking a new Loading of Salt upon the account of the Owners; and being taken upon her coming from *France*, If it should be found that she might have been seized upon pretence that they had carried the said Goods to *Holland*; It was Debated whether the Return should be understood of the immediat Voyage from *Holland* to *France*; or until they should return to *Sweden*? And as to this part, the Lords thought good to take advice of Merchants: *In prasentia, Lockhart & Wedderburn, alt. Wallace. vide, feb. 4. 1668.*

D. 133. *Mckitrick contra Eod. die.*

THE Prescriptions of Reversions and Expiring of Legals, and the taking advantage of the same are so odious; That the Lords inclined to find, that necessary Depurments upon reparation of Houses should not be allowed to a Compryser; in a Declarator to hear and see it found, that he was satisfied by intromission; reserving action to him for the same: But before answer, they ordained the Reporter to consider the Depurments; and to Report whether they were absolutely necessary. This is hard in the point of Law; intromission being to be understood *civiliter & cum effectu* of that which is free, all charges deduced. Hay Clerk.

D. 134. *Trotter contra Trotter Eod. die.*

THE Lords Found, that a Wadsetter having comprised for his principal Sum; may, in competition with another Compryser, pass from his Comprysing, and return to his former Right of Wadset. *Gibson Clerk.*

D. 135. *Anderson dean of Guild of St. Andrews contra James Tarbat. 16. January. 1668.*

William Tarbat having granted Bond for 300 pounds to his Son James and other Children; the said Bond was Reduced at the instance of a Creditor, Because it was subscribed only by one Notar, being a matter of importance: Though it was alledged, that it resolved in three several Bonds; and it was Equivalent as if the three Bonds had been granted for 100 pounds *respective*. For the Lords considered, that the Bond being one and individual; the importance, as to the interest of the debtor, is the same whether it be granted to one or to diverse Persons.

D. 136. *Binnie contra Binnie. 17. January 1668.*

Margaret Binnie being induced to grant a Bond obliging her to resign some Tenements of Land in favours of herself and the Heirs of her Body; which Failzieing, in favours of her Brother Alexander Binnie; and to do no deed in prejudice of his Succession; She did thereafter Marry and Dispose to her Husband the said Tenements. In a pursuit at the instance of her Brother against her and her Husband for his Interest, upon the said Bond and for implement thereof,

*The*



The Lords Found, that she with consent of her Husband ought to Resign. Some of the Lords thought, that the import of such obligements is only, that the Granter should not alter such Tailzies in favours of other Heirs: And that they are not restrained to sell or Dispose for onerous Causes if they should have occasion; otherwise they should cease to be Fiars: The very Essence of Fee and Propertie consisting in a liberty to Dispose. It may be questioned, how far the Husband may be lyable to his Wifes obligements before the Marriage? For there being a Communion betwixt them only as to *mobilia*, it may appear that he should only be lyable to Movable and Personal Debts: Seing *penes quem Emolumentum, penes eundem Onus*; but this point was not Debated.

D. 137. *Straquhan contra Morison. Eod. die.*

A pursuit for Spuilzie being restricted to wrongous Intromission: It was Alledged, that the Defenders are only lyable for their intromission *respective*; in so far as it should be proven that each of them had intromitted at least *pro virili* and conjunctly: It was Replied, that the Defenders being convened *Ex delicto*, they are lyable *in solidum* as Correi; being all accessorie to the wrong: And the pursuit, as it is Restricted, is not for Intromission simply, but wrongous Intromission: And though the Pursuer, by restricting the Pursuit, as said is, has precluded himself as to violent profits and *juramentum in litem*, and other consequences of spuilzie; he has not prejudged himself as to that benefit, that all who are accessory to the wrong should be lyable *in solidum*, which the Law has introduced upon just ground; seing it is impossible, in such cases, where diverse Persons do intromett, to distinguish and prove their intromissions.

The Lords Found, the Defenders lyable Conjunctly. *Wedderburn, Simlair & Straquhan. Alteri Lockhart & Thoirs.*

D. 138. *Pollock contra Pollock. Eod. die.*

The Lords having considered the Renunciation mentioned above. 20 of Novem. 1667; Found, that it being in favours of the second Marriage and in Effect an Assignation, could not accresce to the Granter.

D. 139. *Birnie contra Eod. die.*

MR Andrew Birnie having granted a Bond blank in the Creditors name to his Good-brother *Short*; the Creditors name being thereafter filled up; Mr Andrew Birnie suspended upon double poynding against him and another Creditor of *Shorts*, who had thereafter arrested.

The Lords preferred the Person whose name was filled up; In respect he had shown Mr. Andrew the Bond before the arrestment, and desired him to satisfie the same, though he had not made intimation by way of Instru-ment. This Decision seemeth to justle with that of the 9. November 1665. *Jamison contra Tealzifer.*

D. 140. and the Laird of Innes her Husband,  
contra 21. Jan. 1668

THE Laird of Rosyth having provided his Daughter of the first Mar-  
riage

riage with the Laird of *Innes*, to 10000. Pounds, at her age of Twentie years; and there being no obligation for Annualrent.

*The Lords*, in a Proceſs at her inſtance for her aliment, modified 600. Merks yearly: Some were of opinion that the ſaid ſum being payable at the foreſaid Term, the Annualrent of the ſame ſhould not have been modified for the time thereafter, and that ſhe ſhould be in no worſe caſe than if it had been paid.

D. 141. *Shaw contra Eod. die.*

*THE Lords Found*, That a Wife being provided in *Leſſo* by her Husband, her proviſion ſhould be reſtricted and Sustained as to a Terce, ſhe being no otherwiſe provided before.

D. 142. *Home contra Tailzifer Eod. die.*

*A* N Exception of Improbation being proponed againſt a Writ; and thereafter, *Tailzifer of Harycleugh* being deſired to abide at it, he declared, that he had gotten it as a true Evident, and condeſcended upon the way he had gotten it; and it being alledged, that he ought to be poſitive, Whether he would abide at it, or not?

*The Lords* declared, That after probation they would conſider how far his uſing and abiding at the ſaid Write ſhould import againſt him; and if he be in *bona fide* to uſe the ſame.

D. 143. *Dowglas contra Lady Wamphray. 22. Janu. 1668.*

*THE Lady Wamphray* being provided in an Annualrent out of Lands without reſpect to a *Sors* or Stock, and being infeſt: *It was Found*, that ſhe ought to be lyable to Taxations and publick burdens, being *onera patrimonialia*, though the ſaid Annualrent was payable to her alſwel infeſt as not infeſt.

D. 144. *Juſtice contra Stirling 23. Janu. 1668.*

*IN the Caſe*, *Juſtice* and his Tutors, contra *Stirling* and *Cockburne* her Husband: a Bond being granted to a Husband and his Wife the longeſt liver, and the Heirs betwixt them; which Failzieng to the Heirs of the longeſt liver: And the wife having ſurvived, there being only one Child of the Marriage;

*The Lords Found*, that the Fee of the ſaid Bond belonged to the Husband as *dignior persona*: And that the Child had Right thereto as Heir to him; and that the Heirs of the Wife could have no Right after the Childs deceaſe as Heirs of proviſion to the Child: And that the Wife had not the Right of Fee, which ſhe pretended to be in ſuſpence, until it ſhould be determined by the death of either who ſhould be the laſt liver.

D. 145. *The Town of Glaſgow contra Eod. die.*

*THE Town of Glaſgow* having a Right from the Biſhop to the parſonage Teynds; purſued a Spuilzie: *It was Alledged*, for ſome of the De-  
fenders

fenders, that they possessed by Subtacks from *Blantyre* Tackfman: *It was Answered*, that Certification was granted against the principal Tack, and that the Subtacks were void in consequence: *It was Replied*, that the Defenders were not called to the Improbation; and that they being in possession, the Collusion or negligence of their Author cannot prejudice them.

*The Lords*, upon a debate amongst themselves, Thought, that Sub-vassals being in possession ought to be called in an Improbation against the Vassal their Author; because they could not be miskened being Heretable possessors: But as to the Tennants bruiing Lands by tacks, or Heretors bruiing by Subtacks their own Teynds; They thought, that it could not so well be known that they had Right; and so were not parties necessary to be called: And therefore, before Answer, they ordained to condescend upon the manner and quality of their possession, and whether it was such as the Bishop could not but know. *Sinclair & Lockhart. alter Cuninghame.*

D. 146. *Simpson contra Adamson. 24. January. 1668.*

**U**PON Report it was Debated among the Lords, whether a Decreet of poinding the Ground should interrupt prescription of an Annualrent right, being only against the Tennants, the Heretor not called: Some were of the opinion, that the Decreet being null, *nullum foritur effectum*: Others thought, that Prescriptions being odious, *talis qualis* and any Act of Interruption was sufficient: And as Prescription may be interrupted by any Deed of Molestation of Tennants, being a natural Interruption, so it may be interrupted civilly by a pursuit against the Tennants.

*The Lords* did not decide the Question, but thought fit to advise further.

D. 147. *Town of Dundee contra E. of Finlater. eod. die.*

**T**HE Town of *Dundee* being pursued *in subsidium* for payment of a Debt due by a Rebel, whom they had suffered to escape out of Prison; after Decreet satisfied the Creditor, and took Assignation to the Debt and Bond; whereupon they pursued the Earl of *Finlater* one of the Cautioners: *It was Alledged*, That the Town *ex delicto* had come in the place of the principal Debitor; and payment made by them did liberate the Cautioners, as if payment had been made by the Principal: *It was Replied*, That the Town was only Lyable to the Creditor, who might pass from his Decreet against the Town; and as he might have Assigned the Debt to any other person, The Town as *quilibet* might have a Right from him.

*The Lords Found*, That the Town is not in the case of Cautioners, or *Expromissores ex pacto*, but of *Correi*, being lyable in Law *ex delicto* for, and in place of the Principal. *Vide 9. July 1667.*

D. 148. *contra 25. January 1668.*

**T**HE Lords upon debate amongst themselves, in the case concerning Viccarage; Thought that Yards, for which Viccarage was in use to be payed, being turned into Infield Land and Laboured, The Vicar has no Right to the Teinds of Corns growing thereupon, but the same belongs to



to the Parson: But they did not decide this point, being only debated *incidenter*.

D. 149.

*Keith contra Grahame. eod. die.*

**I**N the case of *Keith of Craigie*, contra *Grahame of Creichie*, *The Lords*, upon probation in mutual Declarators anent a Moss, Found, That the Barony of *Craigie* having pertained to *Straiton of Lauristoun*; and thereafter a part of the same being Disposed to *Keith* and his predecessors; and another part to the Authors and Predecessors of *Grahame of Creichie*, extending the saids Two Parts to the whole Barony; That both the saids Parties had Interest and Right to the Moss in Question, as to Community and Pasture, and casting Peats and Turff: But as to the property of the Moss, they Thought that it should belong to that parcel which was last disposed by the Common Author; seing he disposed the other part only *cum moris & maresis* in the Tenendas and Executive Clause; no mention of the Moss being in the dispositive part: So that the property of the Moss remained with himself annexed to the other parcel.

D. 150. Lady *Traquair* contra E. of *Winton*. 1 Feb. 1668.

**T**HE Earl of *Winton*, having Right by Affignation to a Bond granted by the Lord *Sempil*, did grant a Translation in favours of the Lady *Traquair*, and the Lady *Jean* another of his Daughters, bearing warrandice from his own Deed; and thereafter uplifted the Debt. The said Ladies pursued the Earl of *Winton*, as representing his Grandfather for payment of the Sum; because the Earl his Grandfather had uplifted it: The Defender alledged, that the Translation being a Donation of the Fathers in favours of his Children, whereof he was Master, was revocable; and that he had revoked the same, in so far as he had uplifted the said Sum: *It was Answered*, That the said Translation was out of his hands, having delivered the same to the Pursuers Mother for their use, and that he was obliged to warrand the same.

*The Lords* thought, that the Translation being in the Lady *Winton's* hands being in Law *Eadem persona* with the Earl, it was equivalent as if it had been in his own hands; and that he might destroy or revoke the same: But the Parties being of quality and of near Relation, they did not decide this case, but recommended to some of their number to endeavour an accommodation.

D. 151.

contra *Scot* and *Muirhead* her Husband.  
*eod. die.*

**M**R. *Hary Scot's* Daughter and her Husband Mr. *John Muirhead* for his Interest, being pursued as representing the said Mr. *Hary* for a Debt due by him; The pursuer insisted on the Title of behaving as Heir by Intromission with his Moveable Heirship: *It was Alledged*, That he could not have an Heirship, being neither Prelate, Baron, nor Burges: *It was Answered*, That he had acquired the Land condescended upon to himself in Liferent, and to his Daughter in Fee; which was equivalent as if she had succeeded to him in the said Lands.

*The*

The Lords Assailed from that Title; In respect he had no Right in his Person, in which she could have succeeded: Some were of the opinion, That if the Right had born the ordinary Clauses, and a Power to dispoise and Wadset, notwithstanding the Fee in the person of the Daughter, that in Law he ought to be considered and looked upon as a Baron; being in effect, and upon the matter a Fiar. Hay. Clerk.

D. 152. *Paplay contra The Magistrates of Edinburgh. eod. die.*

**J**ohn Paplay pursued The Magistrates of Edinburgh for payment of a Sum of Money; Because his Debitor Hendry Henderson had escaped out of their prison: It was Alledged, After six years silence such a pursuit could not be sustained against the Town; and that these who were Magistrates for the time ought to be pursued and discussed in the first place.

The Lords sustained the Process, and Found, that the Incorporation being *persona qua non moritur*; The present Magistrates may be pursued for payment of the Debt out of the Patrimony of the Town; without citing these Magistrates for the time when the Debitor escaped; Reserving Action against the Delinquent, who suffered the Rebel to escape.

D. 153. *Parkman contra Allan. 4. Feb. 1668.*

**T**HE Lords Found, that in the case mentioned 15. January. 1668. until the Ship should return to Sweden, it should be esteemed a Voyage, quoad the Effect and point in question.

D. 154. *Ker contra Ker. 5. February. 1668.*

**R**obert Ker of Graden having Infeft his second Son Robert Ker in an Annualrent out of his Lands of Graden and others; upon a Contract betwixt them, whereby Graden for the Sum of 6000 Merks addebted by him to his Son. viz. 3000 Merks of borrowed Money, and 3000 Merks for his Portion (accumulatory, and extending together as said is) was obliged to Infeft the said Robert in 360 Merks, as the Annualrent of the said Sum of 6000 Merks; beginning the first Terms payment of the half of the said Annualrent being for borrowed Money, at the first Term after the Contract: And of the other half being for his Patrimony, after his Fathers decease: The said Robert the Son pursued a poinding of the Ground for by-gones, and in Time coming, the Terms of payment being past: Henry Ker the Pursuers Eldest Brother, compeared and alledged, his Ground could not be poinded, and that he was Infeft therein by a publick Infeftment; at least that his Infeftment was publick by possession; and that the Pursuers Infeftment is base. It was Replied. 1. That the said Hary his Infeftment of the Lands was posterior to the Pursuers Infeftment, and granted not only by a Father to a Son a conjunct person; who by the fore-said Right *præcipit hæreditatem*; and though he cannot be pursued upon the passive Title of *Titulus Lucrativus* during his Fathers Lifetime; yet his Mouth is stoped, so that he cannot question any Deed of his Father preceeding his Right; and that he is in the same case, as if his Infeftment had been given with the burden of prior Rights. It was further urged by the Pursuer, That the Defender condescending upon his Entry and *Initium possessionis*

*possessionis*, he offered to prove that his Right was cled with possession before that time. *It was Duplyed*, That his Infestment could not be cled with possession, but as to the Annualrent of the 3000 *Merks* of borrowed Money; so that it is bafe as to the other 3000 *Merks* of his portion. *It was Triplyed*, that the Infestment was of an entire Annualrent of 360 *Merks*, as appears by the Contract and Seafin: And that the Right being of an Annualrent, though payment of the half of the same be Suspended, the Right being a joint and indivisible Right could not be *ex parte* private, and *ex parte* publick.

*The Lords Found*, That the Infestment of Annualrent, if it should be proven to be cloathed with possession as to the half, is publick in *solidum*; and admitted the Reply of possession: But as to the second Reply, *viz.* That the Defender was *heres per praeceptionem*, and could not question any prior Right granted by his Father. *The Lords Found* it of difficulty and consequence; and reserved the Debate and Decision, until the end of the Process. *Hamilton Clerk. Mr. Thomas Lermont. alter Sinclair.*

D. 155. Mr. George Johnston contra Sir Charles Erskine.  
February 6. 1668.

THE Lands of *Knockhil* being a part of the Lands of *Hodam*, did belong to *Richard Irvine*, and were comprysed from *Robert Irvin* Great Grand-child to the said *Richard* as charged to enter Heir to the said *Richard*, at the instance of Mr. *John Alexander* Minister at *Hodam*: But no Infestment nor Diligence against the Superior having followed upon the said Comprysing, dureing the said *Robert* his Life; The Lord *Lyon* Sir *Charles Erskine* comprysed from Mr. *James Alexander* Son to the said Mr. *John*, the Right of his Comprysing, and obtained Infestment upon the said Comprysing in August 1666. The said *Robert*'s Two Sisters and his Sisters Children, obtained themselves Infest as Heirs to the said *Richard* their Grandfire and Fore-grandfire in June 1666. And upon a Right from them, and their Resignation, Mr. *John Johnston* being Infest in October 1666. pursued for Maills and Dueties: The Lord *Lyon* compeared and alledged, that he and the Tennents ought to be Affoizlied in this possessory Judgement, Because he and his Authors had been in possession by vertue of the Comprysing at the instance of Mr. *John Alexander*, by the space of seven years, whereupon Infestment has followed. *It was Answered*, That the Alledgance is not Relevant, unless he had said that he was in possession seven years by vertue of a real Right, which cannot be said, the Infestment being late and of the date foresaid. It was further Alledged by the Lord *Lyon*, that he ought to be preferred, because he was Infest upon the said Comprysing at Mr. *John Alexander*'s instance against the said *Robert*, as charged to enter Heir to the said *Richard*; and his Infestment was anterior to the said Mr. *George*'s Infestment upon the Resignation foresaid of the said *Robert*'s Sister and Nephews retoured and Infest as Heirs to the said *Richard*. *It was Replied*, That no Infestment or Diligence having followed upon the said Comprysing against *Robert* in his Lifetime; his Sisters and Nephews might have served themselves Heirs to the said *Richard* who was last Infest; and *de facto* was Infest as Heir to the said *Richard*, before any Infestment upon *Alexander*'s Comprysing;



so that his Authors Infeftment being *prior* to the Lord *Lyon's* Infeftment, the Pursuer ought to be preferred: and as *Robert* if he had been served special Heir to his Grandfire, if he had not been inest, the next Heir might have been Inest as Heir to *Richard*; and an Infeftment upon a Right from them would have been preferable to a Compyring against *Robert*; so in this case Mr. *George* ought to be preferred; the special charge against *Robert* being only equivalent to a special Service; and no Infeftment having followed in the person of the said *Robert* or the Compyrser. *It was Duplyed*, That by the Act of Parliament *Ja. 5. Ch. 106. Par. 7.* It is declared that Execution against the Appearan Heir being charged to enter Heir should be equivalent as if he were entered; which is the Certification in the special Charge; and upon a Compyring, if *Robert* had been Inest, Infeftment being taken *quocunque tempore* even after his decease, before any other person had been Inest upon a Compyring or Right from a next Heir; The Compyring against *Robert* would have been preferable.

*The Lords Found*, That the benefite of a possessory Judgement is only competent by virtue of a real Right; and that a Compyrser cannot claim the same, without an Infeftment or Charge against the Superior; and repelled the first Alledgance.

*The Lords Found* The second Alledgance Relevant, and preferred the Compyring in respect of the Infeftment thereupon, before the Infeftment upon the Right from the Heirs of the said *Richard*.

D. 156. *Halyburtoun contra Scott* 17. Decemb. 1671.

A Provision granted by a Father to a Daughter for love and favour, being quarrelled by a Creditor upon the Act of Parliament 1621. *It was Answered*, that the Father the time of the granting of the said Right had an opulent Estate beside, out of which the Creditor might have been satisfied: and the Lords before Answer, having ordained that a tryal should be taken of the Defuncts Estate, and Witnesses being adduced to that purpose: *It was Found*, that the Defence was not proven. It appears that the Defence was not relevant; and that a Creditor is not holden to Debate whether his Debitor had a competent Estate to satisfy his Debt *alivande*; and that Debtors can grant noe Right without an onerous cause, until the Debt be satisfied. *Haystoun Clerk.*

D. 157. *Paton contra Stirling of Ardoch*. 20. Dec. 1671.

SIR *Henrie Stirling of Ardoch* did grant a Back-bond in favours of *Paton* his Sisters Son; whereby he obliged himself, that being satisfied of the Debts due to him, he should denude himself of the Right of the Lands of *Panholls* which pertained to the said *Patons* Father: Whereupon a pursuite being intened against *Ardoch's* Sone, as Heir and Executor to his Father: *It was Alledged*, that the Bond was granted *in Lecto*; and could not prejudice the Heir; and that he had a Reduction depending upon that reason: And as Executor he could not be lyable, the Bond being anent the Right of Lands, and in effect a reversion which is not prestable by Executors; *It was Answered*, that the said Bond tho on death-bed may and ought to affect the Executry; seing *in Lecto* the Defunct might doe any deed to burden his Executry: And his obligements at that

that time are effectual as to his Executry: And *Loco facti imprestabilis succedit interesse*, which is prestable by Executors: And if he had in *leige poustie* granted a Disposition of Lands, and thereafter having Infeft ane other in the same; he had become incapable to fulfil the obligements thereof, both his Heir and Executor would be lyable for damage and interest; and there is the same reason in this case, the Defunct as to burdening and disposing of his Executry, being in the same condition as if he were in *leige poustie*. The Lords before Answer thought fit to try, if the Right was in trust, and if there had been a former Back-bond, which the Pursuers Step-Mother had destroyed as was informed, and certain other circumstances. Gibson Clerk.

D. 158. Lord Maxwell contra Tennents of Duncow.  
16. Feb. 1672

**F**ound that the Defence upon the Acts against these, who, during the dependence of Process, invade or wound the adverse partie, who by the said Acts tyne the cause and forfault their interest in question; being in effect penance and founded upon delinquency, may be proven even before the Lords *prout de Jure*, as to Order and Rati-habition: which was alleadged could not be proven by Witnesses to import the loss of Heretage.

D. 159. Commissaries of Edinburgh contra the Commissaries of Breichen 17. Feb. 1672.

**T**here being a competition betwixt the Commissars of Edinburgh and the Commissars of Breichen, to which of them the confirmation of the Earl of Panmures Testament should belong: the said Earl having taken a House and stayed a whole Session in Edinburgh with his Lady Children and Familie, in order to the breeding of his Children and other occasions; and having died there:

The Lords preferred the Commissars of Breichen, being Commissars of the place where the said Earl had his principal dwelling and his interest and Estate.

D. 160. Lady Milnetoun contra Sir John Whytfurd.  
20. Feb. 1672.

**I**N the Process at the instance of the Lady Milnetoun against Sir John Whytfurd; the said Sir John, after the Process had depended long and all endeavours to delay and prevent a Decision, having insisted upon a Reprobator, upon that head, that the Ladyes Wittnesses were corrupted: It was Alleadged and urged by many arguments, that a reprobator upon the ground foresaid after sentence *in foro contradictorio*, which is the great security of the People, could not be proven but *scripto vel Juramento*: And accordingly the Lords Found that it was only probable that way; and yet this day the Lords having again ordained the cause to be Debated, as to the point foresaid anent the probation of corruption after sentence obtained; they retracted their former Interloquitor; and Found, that Reprobators upon the head foresaid are receiveable; and probable *prout de Jure*, after Sentence.

These

These arguments were urged both at the Barr, and in the Debate among the *Lords, viz.* That Sentences *in foro* are the great Security of the People; and if these should be convelled, upon pretence of such personal exceptions against Witnesses, there should not be a period of Pleas and Process.

2. Upon the consideration foresaid many exceptiones, which are admitted before sentence even after Litiscontestation; are not recieved after sentence; v. g. *exceptiones noviter venientes ad notitiam*; and *ex instrumentis noviter repertis*.

3. Prescription being the great security of the People, *ne dominia sint incerta*, should be weakened; if after Decrees *in foro* founded upon 40. years purchase; the same should be convelled upon probation by Witnesses; that the Witnesses upon whose Testimonie the Decrees proceeded were corrupted.

4. There should be *progressus in infinitum* if the Testimonies of Witnesses should after sentence be reprobated by other Witnesses: and after sentence in the Reprobator, the Testimonie of the reprobatorie Witnesses should be reprobated by others; & *sic in infinitum*.

5. Reprobatores were only in use, when the Designation of Witnesses, before they declare, from their duelling and vocation and other circumstances was questioned as false; which being obvious and easie to be known, It is not to be presumed that the reprobatorie Witnesses will declare falsely, anent such points which may be easily tryed: But the Corruption of Witnesses being an occult and unwarrantable practice, it is not to be presumed that witnesses were present and conscious: and the reprobatorie Witnesses may be suborned and declare falsely *impune*.

6. Our Law is Jealous of Probation by Witnesses, they being for the most part *viles personæ* and yet *habiles*: and Writes cannot be taken away by such probation; and Sentences *in foro* are *scriptura publica & solennis*.

7. By our practice *dicta testium* cannot be questioned *post sententiam*, tho by the comon Law and the Law of other Nations they may: and there is less reason to admit personal exceptions *contra testes* to be proven by Witnesses:

8. As to the *Incommodum*, That a Door should be opened to Corruption, if the Testimonies of Witnesses after Sentence, should not be questionable upon that head; It is easily Answered: Seing Witnesses may be pursued Criminallie and severely Punished, if they may be discovered to have been Corrupted or false. *Actores Cuninghame & Lermouth alteri Mckenzie & Harper.*

D. 161. Mr. James Reid contra the Lady Dundie.

Feb. 21. 1672.

AN Infeftment granted to the Lady Dundie by her Husband, in recompence of a former provision she had by her Contract of Mariage and which she had renounced; was questioned by a Creditor who also was Infeft: upon that ground, that the Ladyes Right was base: and tho Rights granted to Wives upon their Contract of Marriage, or after Marriage when they have no provision, or in recompence of former provisiones; are sustained albeit base; because the Husbands possession is the Wifes possession; yet the Right in question ought not to be sustained upon that ground; In respect the Husband was not in natural possession; the Lands being lyfe-



rented by his Mother; and by the Act of Parliament, the possession whereupon base Rights are sustained is only to be understood of natural possession: *The Lords* preferred the Lady, and repelled the said Defence; upon these considerations, that Infeftments given to Wives in the cases above-mentioned are construed to be publick and are not presumed to be fraudulent: And Wives are not in the condition of other Creditors who may perfect and make their Rights publick; whereas Wives can do nothing themselves; and it is to be presumed that Wives are provided by their Husbands: So that these who are to acquire Rights from them ought to enquire if their Wives be Infeft; specially seing, since the Act of Parliament 1617 anent registration of seafings, they may easily know the same. *Cuninghame &c.* and for the Lady, *Lockhart* and *Lermonth*.

D. 162. Lord *Hattoun* contra *Paterfon*. 22. Feb. 1672.

THE Lords of Exchequer having given the Escheat of the Laird of *Craigie Carnagie*, to *Andrew Paterfon*: and the Gift being assigned to the Laird of *Aytoun* by the said *Andrew*; a decret was thereupon obtained against the Representatives of the Earl of *Dundie*, for his intromission with the Goods belonging to the Rebel, whereupon Adjudication or Comprising followed of the said Earls Estate in *Argyle*, which was Disposed by the said Laird of *Aytoun* to the Earl of *Argyle*: Thereafter my Lord *Hattoun* Thesaurer-depute having gotten a second Gift; pursued the the said *Andrew Paterfon* before the Exchequer upon that ground, That by Acts of Exchequer it was ordained that no Gifts of Escheat should pass without Back-bonds, and the Clerks are Discharged to give out the same otherwayes; and nevertheless *viis & modis*, the said *Andrew* had surreptitiously gotten out the said Gift; and ought to give a Bond that being satisfied of what he can pretend to be due to him by the Rebel, and of the Expences in passing the Gift; he should denude himself in favours of the second Donator: And that it should be declared that the said Gift should be affected with the said Bond, as if it had been given *ab initio*: And accordingly the Exchequer did decern and declared: Whereupon the Thesaurer deput pursued a Reduction of the said Apprying, against *Aytoun* and the Earl of *Argyl*, upon that reason *viz.* That the said Gift, which is the ground thereof, is restricted and qualified, and that the said *Andrew Paterfon* is fully satisfied of what is due to him.

*It was Alledged* for the Defenders, that the Gift was pure and simple without any Back-bond; and therefor the Assigney finding it was such, and there being no Back-bond upon record, was *in bona fide* to take a Right to the same: And the said Decreet of Exchequer being supervenient, and *res inter alios acta*, could not be obruded against a singular Successor, but the Pursuer may have action against the Cedent: *The Lords* Repelled the Alledgnce, and Found that the Decreet and Back-bond do qualifie the Gift both as to the Donator and to his Assigney.

The said Decision appears very hard upon the grounds abovementioned, and because Back-bonds are only personal obligations upon the Granters and do not qualifie Rights, being *extra Corpus Juris*: And his *Majestie*, in granting Gifts of Escheat single or Liferent, is in no other case than other Superiors; as Lords of Regality having Right to single Escheats, whose Gifts cannot be qualified in prejudice of a singular Successor; but by provisions

vifions contained in the Body of the Right: and the import of Back-bonds is only, that the Granters being fatisfied fhould be comptable for the fuperplus; but there is not thereby any tye upon them not to difpofe upon the fame, being comptable for the pryce or value of that which they difpone. *Colington Reporter*: Having heard the caufe at the fide Barr.

D. 163. *Blair contra Blair. 23. Feb. 1672.*

**W**itneffes being examined before Answer *ex Officio*: It was defired that feing *ex facto oritur Jus*, and the Lords being unclear to decide *in Jure* before the point of fact were cleared by probation; and the point of Law and ground of their Decifion is to arife out of the probation; and therefore they may fee and debate upon the fame: which was refufed; feing *publicatio Testimoniorum* by our Law is allowed in no cafe but in Improbations *ex questione falsi*. *Mckenzie alteri Lockhart &c.*

D. 164. *Neilfon contra Elizabeth Arthur. Eod. die.*

**E***lizabeth Arthur* being charged upon a Bond granted by her felf; fufpended upon that reafon, that fhe was cled with a Husband the time of the granting thereof: *It was Answered*, fhe had a *peculium* and Eftate fetled upon her by her Father in thefe Terms, that her Husband fhould have no intereft therein; but that it fhould be manadged by advice of the Freinds named by him for the behoofe of her and her Children: And that the Sum charged for was borrowed and employed for her ufe.

*The Lords Found* the Letters orderly proceeded.

D. 165. *Lady Lugton contra Hepburn and Creichton. 13. June. 1672.*

**A** Decreet being recovered before the Commiffars of *Edinburgh*, at the instance of the Lady *Lugton*, againft her Grandchild *Hepburne* Daughter to the deceaft Laird of *Aderftoun*; Modifying 400. Merks Yearly, for Aliment of the faid *Hepburne*, by the fpace of 13. Years fince her Birth: The Lords in a Reduction and Sufpenfion of the faid Decreet, modified the Sum therein contained being 3500 Merks to the Tenth part of the Sum of 30000 Merks; which was mentioned in the faid Decreet, and confidered by the Commiffars as the Eftate belonging to the faid *Hepburne*; So that in refpect and upon fuppofition of the fame, they modified the faid Aliment: And by reafon the faid Eftate was intricate and litigious, and poffibly could not be recovered: The Lords ordained the Purfuer to Affign the Tenth part of the faid Eftate; not exceeding 3000 Merks; which was done upon that confideration, that the Aliment was modified in refpect of the faid intereft: And if *ex eventu* it fhould be Found, that it could not be recovered, and that fhe had no Eftate; it were unjuft, that fhe fhould be Lyable perfonally; her Grand-mother being obliged, at leaft prefumed to entertain her *ex pietate materna*, if fhe had no Eftate of her own. *Monro Clerk.*

D. 166.

D. 166. *Grott contra Sutherland. 14. June. 1672.*

**T**WO Owners of a Ship being obliged by a Contract to Transport Goods to a certain part: The Lords sustained Action against one of them *in solidum*, for implement of the Obligements in the Contract being *facti* which is indivisible; and they being *socii & exercitores*, so that the Freight might have been payed to one of them; and *eadem ratione* any one of them is Liable, and may be pursued *in solidum*. *Gibson Clerk.*

D. 167. contra eod. die.

**T**HE Lords Found, That a Declarator of Right, which ought to be upon 21 Days, being privileged by a Bill which is *periculo petentis*, should not be sustained being execute upon a shorter time: And Ordained that the Writers to the Signet should not insert in Bills and Summons a privilege dispenceing with the Law, and the *solemnnes inducia* thereby introduced in favours of Defenders, under the paine of 100 *Merks* for the first fault; and deprivation for the second; except in cases which by the Law are privileged and named: The President, Advocate, and others of their number, to meet and consider what these should be.

D. 168. *Henderson contra Henderson. 20. June. 1672.*

**A** Bond being produced to satisfy the production in an Improbation: The Lords without further probation did Improve and Decern *quoad* the Defender; in respect he refused to abide by the Truth of the same. *Gibson Clerk.*

D. 169. *Gray of Haystoun contra Forbes and Lindsay.*  
eod. die.

**W**ILLIAM Gray of Haystoun having granted Bond to Lindsay; and the said Lindsay having Assigned the same to his Daughter; The said William Gray Suspended upon a double poinding, against the said Assigney and a Creditor who had arrested: *It was Alledged* for the Creditor, that the Assignment was made by a Father to a Daughter, to defraud Creditors: *It was Answered*, That the Father by Contract of Marriage was obliged, in case there should be no Heirs Male betwixt him and the Assigneys Mother, to pay to the Heir or Bairn Female at her age of 14. years, 4000. *Merks*; and until then to entertain her: And that the Assigney being the sole Bairn of the Marriage, her Father had given the Assignment foresaid for implement of the said obligation.

The Lords, having considered that the provision by the Contract of Marriage in favours of the Daughters is only in case there should be no Heirs Male of the Marriage, and that the Father should have other Heirs Male of his Body; so that the Daughter should not succeed to the Estate; and that both the Father and Mother are yet living, and of that age that it was not to be expected that the Father would have other Heirs Male of his Body by an other Marriage; and his Daughter was his Appareand Heir whatsoever: Therefore they Found, that the case of the provision in favours of the Heirs Female did not exist, and preferred the Creditor. *Lockheart and Bannerman* for Lindsay. *Bernie &c.* for Forbes. *Gibson Cl.*

D. 170.



D. 170. *Fergusson contra*

21. June. 1672.

**T**HE Lords Found, That a Partie being within the Countrie, the time of the citation upon the first Summonds, and some time thereafter; and going out of the Countrie before the second Summonds, could not be cited at the Pear and Shoar of *Leith* upon the second Summonds; without a warrant in the said Summonds to that effect.

D. 171. The Laird of *Hermiestoun* contra *Cockburn*. Eod. die.

**T**HE Lords Found, That in the case, and in all time coming, where Witnesses are adduced before Answer, they will only allow one Term: so that upon any Diligence, they will admit no Witnesses, but those who are cited by the first Diligence. Mr. *Thomas Hay* Clerk.

D. 172.

*Ramsay* contra *Carstairs*. eod. die.

**A** Father, in his Contract of Marriage, being obliged to provide the Heir Female of the Marriage, and to pay to her 20000 *lib.* at her age of 15 years: and until then to entertain her: there being only one Child and Daughter of the Marriage, she and her Husband pursued the Father and his Curators, he being furious, to pay the said Sum. *It was Answered*, That the said Provision being only payable to the Heir Female, the Pursuer neither had nor could pursue upon that Quality and Interest during the Father's Life; specially seeing both he and his Wife the Pursuers Mother, were living, and of that age, that they may have Heirs Male of the Marriage, or other Daughters: And if they should have Male Children, the Case and Condition of the Provision would *deficere*, and not exist; and if they should have more Daughters, the Pursuer could not have Right to the whole Sum acclaimed. *It was Replied*, That the Father was in effect *civiliter mortuus*; and the Pursuers would find Caution to refund, in either of the said Cases.

*The Lords Found* the Defence relevant, and that such Provisions being settled upon Heirs Female, by reason, and in case of exclusion of the Heirs Female of the Marriage, when Lands are entailed to Heirs Male, and there are no Heirs Male of the Marriage; The Term of Payment could not be understood to be during the Marriage. *Strathurd* Reporter. *Gibson* Clerk.

D. 173. *William Sandilands* contra *The Earle of Haddington*. Eod. die.

**T**homas the first *Earl of Haddington* having Disposed certain Lands, with absolute warrandice, in anno 1610: The now *Earl of Haddington* was pursued as representing his Great Grand-father, to warrant the said Lands from Astriction to the Miln whereunto they were astricted, before the *Earl of Haddington* Disposed the same: *It was Alledged*, That the Warrandice doth not extend to the case of Servitudes, such as Common Pasturage, Thirlage, and such like, which are not latent; and may, and are presumed to be known by Purchassers, who

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ought, and do ordinarily enquire and inform themselves concerning the condition and burdens of the Lands they intend to purchase: specially in the case in question, the multure being not exorbitant: *It was Replyed*, That in Law where *prædia*, either *rustica*, or *urbana*, *ut optima maxima*, are Disposed, they are Disposed as *Libera*: And that the Lands in question are so Disposed, it is evident, in respect the Warrantice is absolute, and they are Disposed *cum molendinis & multuris*. *It was Duplyed*, That the Romans were in use to Dispose either simply, or *cum ista adjectione, prædia ut optima maxima*, the import whereof was, *servitutem non deberi*: But where Lands are Disposed simply, it is construed and presumed in Law, that they are Disposed *talia*, and such as they are; And with such accessories, either as to burden or advantage as *tacite veniunt*; albeit these be not exprest; as Servitudes either Active or Passive: and as to the Warrantice, it is of the ordinary Stile without mention of Servitudes; and it appears from the stile and conception of the ordinary clause of Warrantice, and the speciality thereinmentioned, *viz.* Wards, Non-entries, Inhibitions, Apprysings, &c. That such Incumbrances are only intended, whereby the Right or Possession of Lands, or the Mails and Duties, or any part of them are evicted: Whereas in the case of Affrication the Heretor doth enjoy his Lands and Duties of the same entire; and seing his Corns must be grinded, it is not a material prejudice, that they should be grinded rather at one Miln than an other: and it appears by the Disposition, that it was not *actum* and treated, that the said Lands should be Disposed *ut optima maxima*; the Warrantice being in the ordinary terms without mention of Servitudes: And the Clause *cum molendinis* is only in the Charter and *Tenendas*, and is *ex stilo*, and imports only freedom of Thirlage as to the Disponer.

*The Lords* upon the foresaid Debate, And that the said Miln was a Miln of the Barony of *Torphichen*, whereof the Lands affricated are a part; and that the same were affricated before the *Earl of Hadington* acquired the same; they *Found* the Defence Relevant and Allowzied.

D. 174. *Creditors of Tarsappie contra Kilfanies.*  
23. July. 1673.

**T**HE Lords upon Debate among themselves, were of the opinion, that a confident person having got a Disposition from a Debitor; may at the Debtors desire satisfy such Creditors as he thought fit, there being no Diligence done by other Creditors: And as the Debitor might have done so himself, so the Trustee may do: And that it is provided so by the Act of Parliament. 1621.

They *Found* that the Trustee, if he got any Ease by composition, should apply the benefite thereof, for satisfaction of the other Creditors.

*Item.* That he cannot make voluntar payment in prejudice of a Creditor who has done Diligence. *Gibson Clerk.*

D. 175. *Kilbirny contra Cuninghame.* 24. July. 1673.

**I**N an Adjudication upon the late Act of Parliament: The Lords modified the price to be 18. years purchase, as to the certain and constant Rent; and 9. years as to casual Rent of Coal. *Gibson Clerk.*

D. 176.

D. 176. *Murray contra The Tutor of Stormount.*  
25. July. 1673.

**B**Y a Contract of Wadset, the Wadsetter being lyable to compt for the excrecence of the Duties more than should satisfie the Annualrent; *The Lords*, in a Proceſs for Maills and Duties, *Found* the Exception Relevant, that the Purſuer was ſatisfied of the Sum upon the Wadset, by his Intromiſſion, without Declarator.

D. 177. *Ker contra Ruthven. eod. die.*

**T**HE *Lords Found*, That the Eſtate of the Earl of *Bramford* being ſettled upon the Lord *Forreſters* Son by Act of Parliament, he could not have it but *cum ſua cauſa*, and the burden of his Debts.

*Item*, They *Found*, That the Earl, having entertained his Grand-child the Purſuer, was to be preſumed to have done it *ex pietate avita*; the Earl being a generous perſon, and having an opulent Eſtate; and his Grand-child having nothing for the time, but the Debt in queſtion, whereof the Annualrent was provided and belonged to his Brother. *Monro Clerk.*

D. 178. *Creditors of Hugh Sinclair contra Annandale.*  
26. July. 1673.

**T**HE *Lords Found*, That a Comproyſer upon Debts *anterior* to the Debitor's Rebellion, being Infeſt before Year and Day, is preferable to the Donator of the Liferent Eſcheat. *Mr. Thomas Hay Clerk.*

D. 179. *Mr. John Bayn contra Caivie. eod. die.*

**T**HE *Lords Found*, That a Tack being queſtioned as antedated to obviate an Inhibition, was ſuſpect being raiſed in the Date; So that the ſame ſeemed to be vitiate, and an other year ſuperinduced: And therefore was not a valide and probative Writ in prejudice of the Inhibition: unleſs it could be adminiculate by ſome Adminicle before the Inhibition. *Mr. Thomas Hay Clerk.*

D. 180. 2. June 1674.

**T**HE Kings Maieſty, having by two Letters to the Lords of Seſſion, preſented Mr. *David Balfour* of *Forret*, and Mr. *Thomas Murray* both Advocates, to be Lords of the *Seſſion*: It was moved by one of the Lords, that ſeing by the Law and Acts of Parliament, theſe who are to be admitted to be Lords of Seſſion, ſhould be tryed; Therefore the Tryal ſhould be ſuch as is intended by the Law; the very Notion of Tryal importing, at leaſt a ſerious, if not a ſtriſt and exact way of Tryal.

This was moved, becauſe the way of Tryal had become of late ſo perfunctorious, and *dicis cauſa*, that it was ridiculous, and in effect a Mock-Tryal: Some of the Lords being appointed to examine theſe who were named by the King, and after they had asked ſome trivial Queſtions, hav-

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ing made Report, That they found them qualified; albeit it was not only known to the Examinators, but to all the Lords, and notour to the World, that they were altogether Ignorant both of Law and Practique; and did acknowledge it themselves, not daring to expose themselves to sit in the Outer house as Ordinaries; they prevailing with others of the Lords to go out and officiate for them as Curats.

1. It was urged, that the Estates had considered the Interest of the Kingdom; all Estates being concerned in that Judicatory, that the Lords should be Persons of great Abilitie and Integrity, seing their Lands and Fortunes and greatest Interests, are the Subject of their Jurisdiction and Decisions: and therefore it was provided by diverse Statutes and Acts of Parliament, they should be qualified Persons, and found upon Tryal to be such.

2. His Majesties Letter required, that the Persons now named, should be examined effectually.

3. By diverse Acts of Sederunt, and in special one upon the Kings Letter, for the time, the way of Tryal is prescribed, which is most exact.

4. The Oath of Admission, that the Lords should be faithful, has and ought to have Influence upon all their Actions, as Lords of the Session, that they should be done faithfully; and the Tryal of Lords for the Reasons foresaid, being an important Act of Duty, ought to be done faithfully and sincerely, and cannot be done otherways without breach of Oath.

5. To pretend to obey the Law, and the Kings Letter (which requireth an effectual Tryal) in a way which is superficial, and evidently ineffectual; it is a Cheat, and *Circumventio Legis*; which in others is hateful; but in Judges, who are *Antistites Juris*, is abominable, and inconsistent with the Honour and Integrity that should be expected from the Judicatory.

6. If there were no Tryal at all, the Lords would be passive, if Persons not qualified should be named; but being enjoined to try effectually, if they receive them without an effectual tryal, they are not free of blame; and are accomptable to God, and his Majesty, and to the Parliament.

To all these Reasons, *It was Answered*, That at this time the way of Tryal that had been for a long time, should be continued at this time; and that the Motion was upon some design.

The Mover did purge himself upon Oath, that he had no Design, but to do duty; and did attest the President, that before this occasion they had spoken often to that purpose: and did represent, that this is the fit time to put the Law and Statutes in execution; The Persons named being Advocats, and Persons presumed to be able to undergo the Tryal; so that it cannot be thought that there is any thing of Design against their Persons: That it cannot be denied, but the late way is abusive; and *antiquitas erroris*, or *abusus*, cannot be thought and pleaded to be custom: That in the Year 1629. the Lords by an Act of *Sederunt*, had renewed and ratified all the former Statutes anent the Tryal and Admission of the Lords; and ordained them to be observed; That since that time the Troubles intervened and continued long, so that Prescription cannot be

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pretended for an abuse which had occasioned so great prejudice and clamour.

It was Carried, That the Examinations should be as it has been of late: and upon the Report of *Gosford* and *Craigie*, (appointed to examine them) they were admitted: *Gosford* was of Opinion that there should be another way of Tryal.

D. 181. *Bogie contra The Executors of the Lady Oxenford.*  
4. June 1674.

THE Executors of the Lady *Oxenford*, being pursued at the instance of a Legatar, did in the Compt before the Auditor, give in an Article of Discharge, viz. That the Expences of a Proceſs at the Executors instance should be allowed: *It was Answered*, That if the Executor had not pursued that Proceſs, there was as much free Gear as would have satisfied the Legacie, and the Executor had not prevailed: and if they had prevailed, the benefit would only have accresced to the Executor, and not to the Legatars: and therefore *penes quem emolumentum, &c.* and seing they would have had no benefite, they should have no los by the event of that Proceſs.

*The Lords Found*, That the Executors, having prosecuted a Proceſs intented by the Defunct, did their duty; and *officium* should not be *dammofum*: and therefore the Charges of that Proceſs should not be upon their own accompt, but should be defrayed out of the Executry: but so, that where Executors have no benefit by the Confirmation, but are either simple Executors, or universal Legatars, as to the superplus, particular Legacies being payed, if there be as much Executrie as will satisfy such Expences, and the Legacies; the Legacies ought to be payed intirely, before the Executors have any benefit; but if the Executrie will not amount to satisfy the Charges, and particular Legacies, the Charges are to be satisfied, and the Legacies to be abated proportionally, and the Executor is to have no benefit: but if he be a particular Legatar, he is to be considered with the rest of the Legatars, and to share with them proportionally. *Mr. Thomas Hay Clerk.* Coucluded cause.

D. 182. *Helen Mure contra John Law.* 6. June 1674.

A Relict being pursued, as Executor to her Husband, for a Debt: alledged, she was only Executor Creditor for payment of 2400. *merks*, provided to her by Contract of Marriage: *It was Answered*, That the Debt was satisfied, at least compensated; in sua far as she was obliged by the same Contract to give to the Defunct Goods and Gear, to the value of 2400. *merks*, which she declared she had in *penny and penny worth*, and was worth the same; (which are the Words) and obliged her self to put him in Possession thereof.

*The Lords Found*, That the Husband having lived only 9. years after the Marriage; because of the presumption that he had been silent all the time, and had not craved nor declared the said Sum to be resting; It was therefore to be thought, that he had gotten the Goods, and that the Obligement was satisfied: and yet they thought, that there being so

much confidence betwixt Husband and Wife, it were hard to put her to a full Probation: They therefore Ordained her to give her Oath of Calumny, that she had satisfied the Obligement; and to adduce some Probation and Adminicles to prove *aliqua*lier. *Mr. Thomas Hay Clerk.* Concluded Cause. *Mr. Rodger Hog alteri.*

In the same cause, it being further alledged, that the Husband had payed for his Wife as much Debt as would exhaust that which she had brought with her; and so that she had not payed it effectually.

*The Lords Found,* That if she had put him in Possession of the Goods conform to the Obligement; and that they were her own, at least that she had a Right or coloured Title thereto, that she was neither lyable to warrand, either as to the eviction of the Goods, or from any Debts; seeing the Husband taketh his hazard, and in Law is lyable to the payment of the same.

Some of the Lords thought, That albeit the Husband be lyable to the Creditors of the Wife, whether she perform her part of the Contract of Marriage or not, or whether he got any thing with her effectually or not; yet it were very fit to consider the quality of the Debts of the Wife, alledged payed by the Husband; for if they were such as the Wife could not but know, when she contracted Goods of the value foresaid, and yet she did conceal them; it were a Fraud and Cheat to oblige her self to be worth and give to her Husband, Goods extending to 2400. *marks*, when she knew she was not worth a Groat, her Debts being so great as to evict the same.

They considered, that in this case she did not dispoise any Goods in particular, but was obliged to a generalitie, *viz.* That she was worth Goods of that value; and she cannot be said to be worth in Goods the said Sum, her Debt being equivalent: Seeing *Bona* are understood *debitis deductis*.

D. 183.

*Act of Sederunt.*

*ead. die.*

THE Lords thought fit to make an Act of *Sederunt*, and to intimate it to the Advocats; to the purpose following, *viz.* That when an Alledgance is not admitted, but a joint Probation is allowed before Answer; if there be any other Alledgance found relevant, and admitted to either, Litiscontestation should be understood to be made as to that Alledgance. 2. And likewise as to that effect, that the Parties are concluded, and cannot be heard thereafter to propone any other Alledgance. 3. The Terms being run as to Alledgance not discusst, they are concluded as to the Probation of it, as if the relevancy had been discusst by a formal Act of Litiscontestation, whereas it is remitted to be considered after Probation, seeing often *ex facto oritur Jus*; and upon consideration of the circumstances after Probation, the Lords have more clearness to determine Relevancy.

D. 184.

*contra Hepburn. 7. June 1674.*

THE Apothecary *Patrick Hepburn* his Son, being pursued as Successor for *Titulo Lucrativo*, for a debt of his Fathers, upon that Ground, that tho the Right of Lands granted to him by his Father, was before the Debt;



Debt; yet it was revocable, and under Reversion to the Father, upon a Rose noble, when he contracted the Debt lybelled.

*The Lords* assoilzied from the Passive Title foresaid; but reserved Reduction. It appears that the case was not without difficulty; and that albeit future Creditors in some case may reduce Anterior Rights *ex capite fraudis*; yet this is difficult and unusual: and therefore it had been fitt to determine that Point, *viz.* Whether an appearand Heir, geting a Right revocable, and of the nature foresaid, should be lyable at the least *in quantum*; seing if the Father had discharged the reversion, he would have been Successor, in respect of the Discharge after the Debt; and the Son was a Child, and the Father reserved and retained Possession, and upon the Matter the Father's not redeeming was a Discharge of the Reversion. Actor. alteri Hog. Concluded Cause.

D. 185. *Cunningham contra Lees.* 9. June 1674.

**T**HE Relict of *James Deans*, alledging that her Husband had violently torn her Contract of Marriage; pursued his Heir to hear and see the Tenor of it proven, and offered to prove *casum amissionis*, as said is.

*The Lords*, albeit there was no Adminicle in write, sustained the Summons; in respect there is a *presumptio Juris*, that there are Contracts of Marriage betwixt Persons of any consideration, so that the Marriage was an Adminicle: and the effect being meerly Civil and not Penal, they had no respect to that Alledgance, that the Process was after the Husbands decease, and some 7 or 8 years after the deed.

D. 186. *Paton contra Stirling. eod. die.*

**S**IR *Hary Stirling* of *Ardoch*, on Death-bed, did by a Write acknowledge, that the Right he had acquired from *Doctor Paton* of certain Lands, was under Trust, and for surety of Sums, which he had payed for the Doctor; whereupon *Doctor Paton's* Son intended a pursuit against *Ardoch's* Heir to declare the Trust, and for Compt and Reckoning: And before Answer, *The Lords* having ordained Witnesses to be Examined for clearing the Trust; They Found, That by the Probation the Trust did not appear, and that the said Declaration *in Licto* could not prejudge his Heir, unless there had been some further evidence, that the Declaration was emitted by the Doctor of his own accord, and upon conviction and for Exonerating his Conscience; which did not appear by the Probation. *Lockheart* and *Falconer*. alteri *Longformacus* and *Cunninghams*. *Gibson* Clerk. Concluded Cause.

D. 187. *Lady Spencerfield contra Hamilton.* 10. June 1674.

**I**N the case of the *Lady Spencerfield* contra *Robert Hamilton* of *Kilbrakmount*, *The Lords* Found, that the Alledgance, *viz.* That the Defender could not be Lyable as Intrometter, because there was a Gift given of the Defuncts Escheat being Rebel, is not Relevant; unless the Gift were either

either declared, or were to the Defender himself, or that he had Right from the Donator: For in the first case, he is in condition parallel with an Intrometter, in the case of an Executor confirmed; and cannot be said to be intrometter with the Goods of a Defunct, and *bona vacantia*, the Right of the same being in a living person *per aditionem*, and by confirmation; and a third person Intrometting where there is no Declarator, who has not the Gift himself, nor a Right from the Donator, is not in a better case than an Executor decerned: And in the case of a Donator Intrometting, or the intromission of any other having Right from him, there is the pretence and colour of a Right in the person of the Intrometter, which is sufficient to purge vitious Intromission.

They Found in the same case, that a person entering to the possession of the Defuncts House, by warrand of the Lords: Their possession of the Goods in the House doth not infer Intromission, unless they make use of such Goods as *usu consumuntur*, or dispose of such Goods, as are not of that nature; as Beds, Tables, and such like. *Robert Hamilton Clerk.*

D. 188. *Freeholders of Linlithgow contra The Commissioners to the Parliament.* 12. June 1674.

**I**N a Suspension at the instance of the *Freeholders of Linlithgow-shire*, against their Commissioners to the Parliament. *The Lords Found*, that if the Prorogations and Recesses of Parliament be for a considerable time, so that the Commissioners do or may go home, the Commissioners should not have their Fies, or Charges dureing the same. 2. That if the prorogation be for a short time, and the Commissioners having their Residence at a little distance, in *Edinburgh*, or *Linlithgow shire*, do or may go home; they ought not to have Fees dureing that time. 3. If there be Articles sitting, dureing that time, and they do not go home, tho they be not upon the Articles; they should have their Fees: Because they are concerned to know, and inform themselves, what is in Agitation in the Articles. *Newbyth Reporter. Monro Clerk.*

D. 189. *Bailly Boid contra Store.* November 7. 1674.

**T**HE Lords sustained a Discharge granted by a Master to his Tennent upon payment of his Duty, tho it was neither Holograph, nor Subscribed before Witnesses; but pretended to be subscribed by the Granter: Which the Lords did in respect of the Custom; and that Masters and Tennents are in use to give and take Discharges without Witnesses. And that in the case of Writes, Letters, and Bills betwixt Merchants, the Lords are in use to sustain them, tho they want Witnesses; and there is the same, if not more reason in the case of Tennents; by reason of the great and exuberant confidence betwixt them and their Masters. Some of the Lords thought it hard to recede from the Law, there being no limitation or exception in behalf of Tennents; & *ubi Lex non distinguit nec nos*: And that there is a great disparity betwixt Merchants and Tennents, Compts, Letters, and Bills of Exchange, and other Writs of that nature; being secret Transactions betwixt Merchants and their correspondents; whereunto Witnesses and other persons, neither are in use

to be, nor is fit they should be privy: Whereas Discharges by Masters to Tennents are in use to be, and there is no inconveniency that they should be subscribed before Witnesses; and there is no difficulty to get Witnesses to them; and if they want Witnesses, and be not Holograph, Masters may be prejudged; It being easy to imitate and forge a single subscription, and there being no means of improbation of the same.

D. 190. *The Town of Inverness contra Forbes of Colloden, and Robertson of Inches and others. eod. die.*

**T**His case having been Agitated, not without some heat, amongst the Lords themselves; I thought fit to give an account thereof, at greater length, than I have used in other Cases and Decisions.

The *Town of Inverness* having Charged the said *Robertson of Inches*, and *Colloden* and other Feuars, who hold the Forreft of *Drakies*, and other Lands and Milns, and Fishings of the said Burgh; for payment of their proportions of a Stent imposed upon them, for the use of the Town. And they having Suspended, upon that reason, that the said Stent was unequal as to their proportions, and that the Town had not an Arbitrary Power to impose Stents upon their Neighbours, and Feuars, unless there were an unavoidable, at least a pressing necessity and occasion relating to the good and interest of the Burgh; and in that case, the Neighbours and Feuars were to be Lyable only *in subsidium*; In so far as the Patrimony of the Town and Common Good should be short, and not extend to defray the same.

The *Lords* (Sir *John Gilmour* being President for the time) did by their Decreet of Suspension, *Find* the Letters orderly proceeded: But withall, did regulate the way of stenting to be according to the method and Rules set down by the *Lords* as to the future, which are contained in the said Decreet, and acquiesced to by the Suspenders; the Decreet bearing to be of consent; and containing only a Protestation, that the Suspenders should not be Lyable to any Stent, for maintaining and prosecuting Pleas against themselves.

Thereafter, the Feuars being charged upon another Stent, did Suspend upon that reason only, that the Regulation and Method appointed by the *Lords* had not been observed: and did intent a Declarator, that they should not be Lyable to Stents, but such as should be imposed, in the way and according to the method foresaid.

Tho there was no other reason in the said Suspension, nor conclusion in the said Declarator, but as is immediatly related; yet, another reason was thereafter insisted upon, both in the Suspension and Declarator; and they did plead, that they were exempted, and ought not to be Lyable to any Stent upon any account or method whatsoever; by reason, that their Lands, and in special the Forreft of *Drakies*, were Feued to them for a *Reddendo* and Feu-duty contained in their Inseftments *pro omni alio onere*.

The Case not being fully debated at the Bar, Some of the *Lords* conceiving, that the Lands of *Drakies* were not a part of the Original and Ancient Patrimony of the Town, but that the same had been acquired by the Town; and thereafter had been Feued out by them in the Terms foresaid for payment of a Feu-duty *pro omni alio onere*; they were of the

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opinion, that they could not be Lyable to a Servitude, unless the same had been constitute, either by their Infeftments or otherways; But specially in this case, they being free by their Infeftment, and exprefs Clause therein, of all burden or Servitude, but their Feu-duty: And that they could be in no other case, than if the Town of *Edinburgh* should Feu any of the Lands lately acquired by them, for payment of 2 Duty *pro omni alio onere*: And yet the plurality of the Lords were of the opinion, that if the Town could prove and make appear, that they have been in use, by the space of 40 years or above, to Stent their Feuars for defraying their Affairs, and Burdens, and Works of the Town, that they ought to be Lyable, notwithstanding of the said Clause *pro omni alio onere*. And accordingly before Answer a Term is Assigned, for proving the Towns Possession.

In the *interim*, The most Eminent of the Advocates, and in special such as were for the Town; being discharged pleading, upon occasion of the Appeals; this case came in Agitation the last Session; and some of the Lords, even these that were of the opinion formerly that the Feuars should not be Lyable to be stented, upon the ground and mistake foresaid that the said Lands of *Drakes* was not a part of the Ancient Patrimony of the Town; they were convinced, upon the production of the Towns Evidents, that the said Lands were a part of the Ancient Patrimony of the Town, being Incorporate and contained in their Infeftments with the Burgh it self, bearing one individual holding and *Reddendo*: And therefore conceiving, that *est Judicis supplere quæ desunt Advocatis in Jure*, and which arises upon production of the Papers; they did argue, that the Feuars ought to be Lyable for these Reasons.

1: That there is a difference betwixt the Original Patrimony of the Town, which is profectitious, and flowes from the Bounty of Princes, and is given to Burghs Royal, for sustaining and defraying their necessary burdens and occasions; and betwixt that, which is adventitious, and acquired by Burghs themselves, by their own Moyen and Means.

As to the first, The same being given *eo intuitu*, and to the end, that it should be a Stock for doing and defraying the Common Affairs and burdens, and Charges of the Town, it cannot be given away, nor Feued, but *cum sua causa*; and so that they should be Lyable to Stents and Impositions upon occasions requiring the same: Whereas the other is acquired by Towns as *quilibet*, and the Feuars ought to be considered as *quilibet*, and as in the case of other Feuars.

2. Upon the consideration foresaid, it is statute by diverse Acts of Parliament, and in special by the 36. *Act. K. Ja. 4. Parl. 3.* And the 181. *Act. K. Ja. 6. Parl. 13.* That the Common Good of Burrows should be observed and kepted to the common profite of the Town: And the said Act of *K. Ja. 4th.* bears, That Lands, Fishings, Milns, and others belonging to the Burrows, should not be set but for 3. Years allenarly; and if any be set otherways that they be of none avail: And as this is Law, so it is just, otherways, those who have Tenements within Burgh, and who upon occasions are Lyable to be Stented, should be unjustly and heavily prejudged, if the Lands and Fishings which, being in the Towns hands, would be lyable in the first place to such Burdens, may be given away; so that the whole burden should be rolled over upon them.

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3. The foresaid pretence, That the Feuars were Lyable only to the Feu-duty *pro omni alio onere*; was Answered, *viz.* That *omne aliud onus* was to be understood, of any other ordinar duty payable to the Town as Superiors; but does not exempt the Feuars from these *munera extraordinaria Patrimonialia*, for the necellar use and preservation of the Town: As in the case of Lands disposed to be holden of the Disposer, for payment of a Blenst or other Duty *pro omni alio onere*, The Clause foresaid will not exempt the Vafal from Taxations, and the Superiors relief of the same against his Vafal:

4. It appears by a Ratification of Queen Mary, produced for the Town, That the Town of *Inverness* had made diverse Acts concerning the setting the Lands, Milns, and Fishings, which are ratified by the said Queen; And which, if they were observed, would oblige the Feuars to be lyable to be Stented.

The saids Lords, Who were of the said opinion, thought, That upon the Grounds and Production foresaid, the Feuars of *Drakies* ought to be lyable without any farther probation, to Stents imposed for the use and interest of the Town; the same being imposed necessarily and equally according to the method abovementioned: And yet the Town having adduced probation by production of the Records out of their Books and Witnesses; they considered and thought, that the possession of the Town, by imposing their Stents by the space of 40. years, was proven: In respect, it appeared by the Extracts out of their Books, That from the year 1624. until 1664. they have been in use to impose Stents in case of Exigency, for the private use and concerns of the Town; Notwithstanding of what was alledged at the Bar, against the said probation, and in special, that the Books themselves ought to be produced; whereas there was nothing produced but Extracts of Acts, and that the probation, that the Town has been in use to Stent for repairing their Bridge, did not quadrate to the case and point in question; seing it was to be proven that Stents were imposed for the private use and concerns of the Town, and the Bridge and repairing of the same is of publick concern and interest, relating not only to the good of the Town, but of the whole Shire: And the Record, anent Stent in relation to the Bridge being out of the way, and not considered as a probation; It was not proven, that the Town had been in Possession 40. Years.

Nevertheless, The plurality of the Lords did Find the Alledgeance foresaid of Possession, by the time foresaid, not proven; upon that ground that the Bridge was not to be considered as the proper concern of the Town: And did suspend and declare in favours of *Inches* and other Feuars: Diverse of the saids Lords dissenting upon the Grounds foresaid; and that it appears to them, that the Feuars, upon the account of their Lands, were Lyable to be Stented, being the ancient and proper Bursal Patrimony of the Town: And albeit a continued tract of Possession by the space of 40. years, which hardly is to be expected in *servitutibus*, or impositions that are discontinued, could not be made out, as they conceive it was; yet the Feuars having homologate and consented, and submitted to the said Impositions without repineing, until after the Year 1664. That they did not so much question the Town's Right to impose upon them the said Stents, as the exorbitancy, and frequency, and inequality of the same

as to their proportions ; they could not be heard now to plead and pretend exemption from the said Stents.

The Lords having Found as said is, That the Lands of *Drakies* were not lyable to the said Stents : The said *Robertson of Inches* in behalf of himself and some other Feuars, having only appeared in the debate, and *Forbes of Colloden*, who thought himself concluded by the above-written Decreet of Suspension, and has consented to the same ; did notwithstanding desire, that he might have the benefite of the said Interloquitor, and that the parcel of Land, which he had in the Forrest of *Drakies*, might also be declared free of Stents ; seing there was *eadem ratio*, and so there ought to be *idem Jus*, as to him and the said other Feuars.

It was Answered for the Town of *Inverness*, That he could not be heard, in respect of the said Decreet of Suspension *in foro*, and of his express consent therein contained. Whereunto it being Replied, that the consent was only as to the individual Stent therein questioned, and did not conclude him as to other Stents ; and that notwithstanding thereof, it being now Found, that the Forrest of *Drakies*, whereof his was a part, was free ; the immunity foresaid could not be denyed to him. It was Answered, and the said dissenting Lords were of the opinion, that a Decreet *in foro* did bind him whatever others could pretend : And it was evident by the said Decreet, that it was then the Lords meaning (Sir *John Gilmour* a person of great Parts and Integrity being then President) that all the said Lands of the Forrest of *Drakies* should be lyable in all time coming ; and his consent is most positive and express to the Regulation of Stenting as to the future : And the said Consent being premitted to the whole decerniture of the said Decreet, doth influence and affect all the Articles and Heads of the same, unless it had been limited and special as to an or moe, and not all : And it was so far from being limited to the Stent then in question, that there is a Protestation subjoined to the decerniture in these Terms, That *Colloden* and the Suspenders doe protest, that they should not be lyable to such Stents as should be imposed, for maintaining the Plea against themselves ; And *exceptio & protestatio firmat Regulam & Sententiam in non exceptis, & iis, contra quæ non emissæ est protestatio*.

The Lords notwithstanding Found, That *Colloden* should be free of Stents, as to such Parcels as he had of the Lands of *Drakies*.

Thereafter the Town of *Inverness* did alledge, that the Suspenders ought to be lyable as to the Milns and Fishings, that they held in Feu of the Town, seing they are undoubtedly the ancient Patrimony of the Town : and they offer them to prove, that they have been in use, past memory, to stent the same with the Burgal Lands when occasion required, not only for Taxations, imposed by Parliament, but for the private use of the Town.

It was Answered, That the said Alledgance was not now competent ; seing the Debate, whereupon the Interloquitor proceeded, was concerning the Suspenders Feues, which they hold of the Town, which comprehend both Lands, Milns, and Fishings : and there is no reason of difference, why the Milns and Fishings should be in an other case than the Lands.

It was Answered for the Town, That in all the Debate, there had been no mention of Milns and Fishings ; and they were content to make Faith, that they did not understand the Debate to be concerning the Milns and Fish.



Fishings, but only the Lands of *Drakies*; And if they had thought that they had been concerned to prove their Possession as to the Milns and Fishings there was that speciality that they might have proven more clearly their Possession, as to the Milns and Fishings, than as to the Lands: and now they are able to prove the same.

Some of the Lords thought, That the Question being of that Importance to an Incorporation, and they wanting the Assistance of their most able Advocats, upon the occasion abovementioned; and the exception being undoubtedly relevant to infer their Right, and the conclusion of their Declarator, as to the Milns and Fishings, that they should be lyable to be stented if it were proven; It were hard, that their Right should be taken from them upon a quirck, and pretence of Omission, being upon a mistake, as said is. In end, the Plurality of the Lords *did Declare*, by their Interloquitor, That if in *November* the Town should be able to make appear by ancient Records, that they had been in Possession of stenting the Milns and Fishings, with the Tenements of the Town, when Impositions and Stents were laid on by the Town only (and not by the Parliament) for their private use, that the same should be lyable as other Burgal Lands.

D. 191. *Hamilton contra the Earl of Kinghorn.*

11. November 1674.

*James Mauld* of *Melgum*, having assigned to *James Hamilton* two Bonds; and he having intimate his Assignment to the E. of *Kinghorn* grantor of the same, did thereafter write to the said Earl, shewing him that he had use for the Sums contained in the said Bonds; and that he desired a course might be taken to pay the same: And in Answer to his Letter, the said Earl did Write and subscribe a Postscript upon a Letter written to him by the said *James Mauld*, to that purpose, that the said *James Mauld* had assured him, that he had made the Assignment foresaid upon assurance that my Lord should not be troubled to pay the said Debt, and that he was about to take a course to that effect: but that notwithstanding, if he must be his Debitor, he should take a course to pay the Annualrent; but as for the Principal Sum, it was not foreseen by him, that he should be put to pay it at that time, and he desired forbearance. And thereafter being charged, the said Earl suspended upon that reason, that the said Bonds were granted by him to *Melgum* for the price of Lands Disposed by him to the Earl; and by a Back-bond of the date of the said Bands, *Melgum* was obliged to Warrant the Rental of the said Lands for two years: and *quatenus* the Tennents should be short in payment of their duties, the time forsaid, he should pay wherein they should be wanting, and that the Earl might retain in the first end of the foresaid Sums: And that the said Earl had got a Decreet against the Tennents of the said Lands, for payment of the Sums therein contained; and therefor that he had ground of retention and compensation upon the foresaid Bond granted by *Melgum* effeirand to the Sums restand by the said Tennents. Whereunto *It was Answered*, that tho Compensation competent against the Cedent is competent against the Assigney, yet where there is not only an Assignment which is the deed of the Cedent; but a delegation, and

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the Debitor doth accept and consent and becomes Debitor, as in this case, as appears be the foresaid Letter written to the charger; compensation is not receivable. *It was Replied* for the Suspender, that the Letter is not positive that the Suspender should become Debitor, but only in these terms *if he must be Debitor* to the charger; and that upon the matter he is not Debitor to him, in so far as he has a ground of compensation. Whereunto *It was Answered*, That these Words, *If he should be Debitor* are to be understood only, in Relation to the Complement and Assurance contained in *Melgum's* Letter, viz. If he should not take course himself with the said Debt; and that the Letter is positive, that the Earl should pay the Annualrent, and also the Principal Sum, which he could not do presently: and if the Earl had intended to compensate, he should have told the Charger, that he had a Ground of Compensation, in which the Charger would have had recourse against the Cedent, and would not have relied upon the Suspenders Letter.

*The Lords Found* the Letters orderly proceeded, in respect of the said Answer and Letter.

D. 192. *Gordon contra Pitfligo.* 12. Novemb. 1674.

**M**R. Thomas Gordon and his Father pursued the Lord *Pitfligo*, upon a Promise to enter them to certain Lands, which they had acquired, holden of him.

*It was Alledged*, That if there was any such Promise, it was to be performed in write, by a Charter to be granted by the Defender; and there is *locus Pœnitentia* until the Charter be subscribed. *It was Answered*, That the Promise was referred to the Defenders Oath: and albeit there is *locus pœnitentie* in *Synalagmis*, and Contracts; yet where there is a positive Promise to give or do any thing, the same being verified, ought to be fulfilled; and there is no *locus pœnitentie* upon pretence that it should be fulfilled in Write.

*The Lords* repelled the Alledgance, in respect of the Answer foresaid. *Monro* Clerk. *Newbyth* Reporter.

D. 193. *Paton contra Ardoch.* eod. die.

**W**illiam Paton Son to the deceased Dr. Paton, pursued *Stirling*, and Sir *Harie Stirling* of *Ardoch*, as representing his Father, for Implement of a Write, granted by his Father on Death-bed; whereby he was obliged to denude himself of the Lands of *Panholls*, being satisfied of such Sums of Money as should be found to be due to him by the said William and his Father, after Compt and Reckoning.

*It was Alledged* for the Defender, That his Father had acquired a Right to the said Lands, from the said Dr. Paton, being his Brother in Law, having married the said Sir *Henrie's* Sister, upon a Back-bond, containing a Reversion in favours of the said William, the said Sir *Harie's* Nevy: and that thereafter the said William being Major, had discharged the Reversion; so that the Defunct, and now his Heir has an irredeemable Right to the said Lands: and that the same pretended Deed on Death-bed, could not take away the same.

*It was Replied*, That the Defunct on Death-bed did, and might exoner his Conscience, by a Declaration, that the Discharge of the Reversion was  
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on Trust: And there were other Adminicles and Presumptions concurring, to evince that it was a Trust; *viz.* The near Relation of the Parties; the Defunct being the Pursuers Uncle, and that the Bonds granted by the Doctor, either to the Defunct himself, or to other Persons from whom *Ardoch* had Right, were not retired; which would have been, if the Right in *Ardoch's* Person had not been on Trust: It being against Reason, that *Ardoch* should have both Right to the Lands, and to the Debts, for which the said Right was granted. *It was Duplyed*, That the Defender being an Infant, neither doth, nor is obliged to know what was betwixt his Father and the Pursuer, unless there were a Write to clear the same; and his irredeemable Right by the Discharge of the Reversion, cannot be taken away by Presumptions: and that a Write on Death-bed, upon what pretence soever, cannot prejudice the Heir: And it cannot be thought, but that if a Trust had been intended, the Pursuer would have taken a Back-bond as he had done formerly; and the Defenders Father might have given a Discharge of the said Bonds as to personal Execution.

*The Lords Found*, That the Trust was not proven: and that the Declaration on Death-bed could not prejudice the Heir. Thereafter it was urged for the Pursuer, That at least he should have Action against the Defenders as Executors, for affecting the moveable Estate belonging to the Defunct, and in Implement of the said Write, at least *in subsidium*, as to Damage and Interest.

Upon a Debate amongst the Lords themselves, It was urged, That the said Writ, being in effect a Reversion, was only prestable by the Heir, who only could denude himself of the Right of the said Lands: And persons on Death-bed, *ipso momento* that they become Sick, they lose their *legitima potestas*, either as to prejudging their Heirs, or their Bairns and Relicts: And they cannot dispose of their Deads Part, but by a Nomination, or Legacy, and a Reversion could not be given, by way of Legacy.

*The Lords Found*, That the said Write could not affect the Executry. *Gibson Clerk.*

D. 194. *The Executors of the late Bishop of Edinburgh contra the present Bishop. eod. die.*

**T**HE Executors of the late Bishop of Edinburgh, Pursued the Commissars and Procurator Fiscal, and the now Bishop of Edinburgh for the Quots of Testaments, that were either confirmed, or had fallen by the decease of Defunct persons; and were confirmable before the said late Bishops Death, and fell under his Executry: And also for the Quots of all Testaments confirmed, or confirmable for the half year, after the said Bishops decease, and falling under the *Ann.*

*The Lords Found*, That the Quots of Testaments, that were not confirmed, did neither fall under the Bishops Executry, nor the *Ann.*; But only the Quots of such Testaments as were confirmed, either in the Bishops Lifetime, or during the *Ann.*: Upon these Grounds, which were debated at the Bar, but more at length among the Lords themselves; *viz.*

1. The Quots of Testaments do not belong to Bishops, as having a share and



and interest in the Moveable Estates of Defunct Persons after their decease; which are only divided betwixt their Executors, and Bairns, and Relict; but the said *Quots*, are in effect Sentence, or Confirmation-Silver, which is given to the Bishops upon that account and consideration, That by their Sentence or Confirmation (which is *instar Sententie* being *actus voluntarie jurisdictionis*) The Defuncts Estate is secured to be forthcoming to all persons concerned, both Creditors, Relict, Bairns and others: And therefore, until that be done, there is no *Quot*, nor confirmation-silver due. 2. The Lords of Session had, by Act of Parliament, as a part of their Sallary, Sentence-Silver, *viz.* Twelve pennies of the pound, until the same was taken from them by Act of Parliament their Sallary being enlarged, and settled upon them otherwayes: And, if during the time, the said Lords had their Sentence Silver, any of them had deceased before Sentence, tho the Process had been commenced and advanced beyond Litiscontestation; it cannot be said, that the Executors, of a Lord deceasing before the Sentence, could claim any part of the Sentence Money, where the Sentence is pronounced after his decease. 3. By the 28. Act of his Majesties *Parl. 1661.* the *Quots* of Testaments are discharged; and yet the Bishops being restored to the Right of *Quots*, the same will be due for any Testament confirmed thereafter, notwithstanding of the said Act of Parliament; whereas, if *Quots* were due from the time they became confirmable, they could not be claimed, tho confirmed, since the Bishops were restored as said is, to their *Quots*, as being discharged by the said Act of Parliament.

The Lords did also Find, That the Bishops Relict and nearest of Kint had Right to an *Ann*, even before the late Act of Parliament (being the 13. Act of the 3. Session of His Majesties second Parliament, concerning the *Ann*, due to the Executors of Bishops and Ministers) In respect by a Letter of His Majesties Grand-father in anno 1613. and Act of the Bishops thereupon, an *Ann* was Found to be due to the nearest of Kin of Bishops: But in regard by the said Letter and Custom, before the said late Act of Parliament, the *Ann* in relation to Bishops, was, if the Bishop deceased before *Michaelmas*, after the Moneth of his Executors had the half of that year, as belonging to the Bishops Incumbent *Jure proprio*; and the half of the next year as *Ann*; the half of the Rent of his Benefice for the half year preceeding *Michaelmas*, the other half being due to him as Incumbent, and fallen under his Executry: Whereas by the late Act, the said *Ann* is so ordered, that the Bishop or Minister surviving *Whitesunday*, the half of that year does belong to him and his Executors upon account of his Incumbency; and the other half for the *Ann*: And the Incumbent surviving *Michaelmas*, he is to have the whole Year as Incumbent, and the half of the next year is to be *Ann*: Therefore the Lords Found, That the late Bishop having deceased before *Michaelmas*, and before the said late Act of Parliament, the *Ann* should be as it was formerly.

In the same Process, It was debated among the Lords more fully than at the Bar, whether the *Quots* of Testaments should fall under the *Ann*? And it was urged by some, that the *Quots* of Testaments are but casual Obventions; and that they are due as said is, upon the account foresaid. *viz.* That Testaments are confirmed by the Bishop, or his Officials, and

*ratione*

*ratione operæ*, and as Sentence-Silver; so that they cannot be due, but to the present Incumbent, who does a duty; and that Compositions for entering of Vassals and Liferent Escheats and Non-entrys, and such like casualties do not fall under *Ann.* Whereunto *It was Answered*, That by the Kings Letter, by the Act of Parliament, and by the Canon Law, the half of the Rent of the Benefice, Stipend, and Living fall under the *Ann.*; and the *Quots* of Testaments are a considerable part of the Bishops Rent, especially in *Edinburgh*; and undoubtedly is a part of his Living and Benefice: And the Rent of Milns which is casual, and depends, where there is no affricition, upon the arbitrary will of Parties to come, or not to come to the same, and is likewise due *ratione operæ*; doth fall under *Ann.*: As also the Rent of Fishings, and such like which are casual: And there is a great difference betwixt *Quots*, which is an ordinary yearly Rent, and cannot fail so, but there will be still Testaments confirmed; and the casualties of Superiority as Liferents &c. which are so uncertain; as that it cannot be said, they are the Bishops Living: And the Argument, that *Quots* are due *ratione operæ*, and by reason of actual confirmation, which cannot be due by the Executors or Relict, is of no weight; seeing the other constant Rent of Stipends and Benefices is due *ratione operæ*, and because the Bishop or Minister serveth, which is not prestable by Executors or Relicts.

*The Lords*, notwithstanding, enclined to *Find*, That the *Quots* do not fall under the *Ann.*: but upon the motion of some of their Number, that the Interloquitor, being to be a preparative, should be further considered, they thought fit not to proceed to the Voting. *Gibson Clerk. Forrest Reporter.*

D. 195. *Craig contra Edger. 20. Novemb. 1674.*

**T**HE *Lords Found*, That a Bond bearing Annualrent, being Assigned by a Woman, to her former Husband by her Contract of Marriage; and the Assignment not being intimate, a Retrocession did settle again the Right of the said Bond in the Person of the Wife; *Quia unumquodque dissolvitur, eo modo quo contrahitur*: And the said Bond being thereafter assigned in favours of the second Husband, he and his Executors had Right to the same; and that it was, not *in bonis* of the first Husband, though the Retrocession was not intimate until after his decease. *Lord Glendoeck Reporter. Mr. John Hay Clerk.*

D. 196. *Thoirs contra Tolquhon. eod. die.*

**M**R. *David Thoirs*, in an Improbation at his Instance, against *Tolquhon*, of a Bond, did crave Certification, because the Principal was not produced, but an Extract out of the Commissars Books of *Aberdeen*.

*The Lords*, upon a Report, having debated amongst themselves, what was fit to be done in the said Case, seeing it appeared that the said Pursuite was intended, not of design to question the Bond, upon evident and probable Grounds of Falschood, but only to have it produced; and it appeared by many Presumptions, that the Bond was a true Deed, and never questioned by the granter *ex capite falsi*, tho he had suspended upon  
Y y y other

other Reasons; And there had been much diligence by Decrets, Horning and Compyring upon the same; and yet the Bond being of an ancient Date, beyond 40 years, there was no person living that could prove the Tenor thereof, and declare that they knew the same to be a true Deed: And on the other part, the Lords could not refuse to grant Certification, seeing an Extract does not satisfy in an Improbation, where the Principal was not produced.

It was moved by some of the Lords, That if the Pursuite was not intended within the years of Prescription, that it should not be sustained; seeing albeit *causa falsi* doth not prescribe, where the Paper or Subject craved to be improven is produced; and the Pursuer offers to improve and make it appear that the same is false; yet when the Improbation is only to try the condition of the Defenders Right, and in order to a Certification, if the Principal cannot be exhibit, it is not properly *causa falsi*: And the effect of the Certification is only that the Write for not production should be holden as false *presumptive*, and *fictione Juris*: And upon the matter it is but a Reduction for not Production.

The said Point being of great Concernment, and the Debate being upon a Bill, and the Process not produced, that it might appear whether it was intended within the 40 years or not, it was not decided.

D. 197. *Cranston contra Brown.* 21. Novemb. 1674.

A Testator having left by Testament a Sum of Money, due upon an Heretable Surety; and having named his Sister as Executor and universal Legator, she was pursued for payment of the said Legacy; at the least, that being likeways Heir, she should denude her self of the Right of the said Sum.

It was Alledged for her, That the Subject being Heretable, the Defunct could not bequeath the same in Testament.

It was Replied, That when *res aliena* is left in Legacy, the Executor in Law *tenetur luere*, and ought to redeem the same, or pay the value; and *multo magis* in this case, the Testator having in effect left *res sua*, though upon the matter *res aliena* as to the power of disposing of the same on Death-bed, or by Testament: And therefore the Executrix, if she be Heir, (as she is in this Case) ought to give the same: and if she were not Heir, ought to redeem the same, as said is.

The Lords, upon the debate amongst themselves, considered, that in Law, *legatum rei aliena* is effectual if the Testator *sciebat rem alienam*; whereas *si nesciebat*, it is to be presumed he would not have left that which was not his own; and tho the Testator upon mistake was ignorant that it was *res aliena*, yet if the Legator was of so near Relation that it was probable he should have left the legacie, at least the value, if he had knowen it was *res aliena*, the Legacy was effectual: And that in the case in question, the Legator was the Defuncts Nevy by his Brother, and the Sum that was left was his own, tho Heretable as said is; and the Testator either knew that he could not dispose of the same being Heretable, and was presumed and obliged to know the Law; and if he was ignorant in point of Law, *ignorantia Juris nocet*: and therefore the Lords inclined to sustain the Legacy. But one of their Number having desired, that the Decision

might



might be delayed while the next day, that he might have his thoughts upon the Case, the same was delayed. *Strathurd Reporter*. Mr. *John Hay Clerk*.

D. 198. *Pilton contra the Creditors of the Lord Sinclair.*

30. November 1674.

THE deceast Lord *Sinclair*, having maryed his Daughter with *John Sinclair* younger of *Hermiston*, did dispone to him his Estate, with the Burden of his own proper Debts, mentioned in the Right; and took a Bond for an Annuity of 8000 *merks*, first in the name of *John Watt*, and thereafter the said Bond being given back, he did take another Bond, for the said Annuity during his Lifetime, in the Name of *George Cockburn* of *Pilton*: Whereupon the said *George* did diligence by Compyring and otherways, against the said *John Sinclair* of *Herdmanston*; and did also take the said *John Sinclair's* Liferent Escheat. And upon the Grounds foresaid, and a Suspension of double Poinding against him, diverse Creditors of the Lord *Sinclair* did question *Pilton's* Interest upon the foresaid Bond, as being fraudulent, and a contrivance to frustrate Creditors, and to secure so considerable an Interest for the use of the Debitor, contrare to the Act of Parliament, 1621.

The Lords, notwithstanding, preferred the said *George Cockburn*, as having Right to the Duties of *Herdmanston's* Estate, by vertue of the said Gift of Escheat; reserving to the Creditors their Declarator of Trust, or Reduction upon the said Act of Parliament: And accordingly the whole Estate of *Herdmanston* being set in Tack thereafter, the Tack-duty is payable to *Pilton*, and the other Creditors in order, conform to the said Decreet.

The Tacks-men being charged at the instance of *Pilton*, Did Suspend upon double poiding, pretending they were troubled by other Creditors of the Lord *Sinclair*: And the said Creditors compearing, did alledge, that they ought to be preferred to *Pilton*, in respect his interest *ab initio* by the said Bond for the Annuity foresaid of 8000 *Merks*, was a fraudulent contrivance, in prejudice of the Lord *Sinclair's* Creditors; that the foresaid Annuity might be secured to him in the Person of *Pilton* his Friend and Relation; and thereupon might live plentifully, his Creditors being defrauded, and suffering in the mean time: And that the Gift of Escheat of *Herdmanstons's* Liferent, being granted *intuitu*, and upon account of the said interest; *laborat eodem vitio*, and was in effect to the behoof of the Lord *Sinclair*.

It was Answered for *Pilton*, That tho the said Bond was granted to him, without an Onerous Cause; yet *intuitu* of the same, and thinking that he was thereby secured, he had *bona fide* alimented my Lord *Sinclair*, and had payed to himself, and had engaged to others for him, to pay diverse Sums of Money, before any interruption made by the Creditors; So that before any Diligence done by them, his Right became Onerous, and the Gift of Escheat of *Herdmanston's* Estate was taken by him, to secure himself as to his relief: And that the King and Exchequer did, and might give the said Gift to him upon the consideration foresaid; and thereupon, in the former Decreet of multiple poiding, he was preferred to all other Creditors.

tors: And that his Majesty had also gifted the Liferent Escheat of the said Lord *Sinclair*, to Mr. *George Gibson*, upon a Back-bond, that thereby he and the other Creditors thereinmentioned being satisfied, the *superplus* and benefite of the said Escheat should be applyed for the Aliment of the said Lord *Sinclair*: And therefore, tho *Pilton* should not have Right as he had to the said Tack-duty, the foresaid Annuity and Gift of Escheat of *Herdmanston's* Liferent would accrue to Mr. *George Gibson* Donator, to the uses foresaid; and fall under his Gift.

*It was Answered* for the Creditors, That they were content the Lords should modify an Aliment for the Lord *Sinclair*: And that *Pilton's* interest should be sustained effeirand thereto; the *Superplus* being applyed, as it ought to be, for their satisfaction.

*The Lords*, for the most part enclined to Find, that *George Cockburn's* Right to the said Annuity was Onerous, In sua far as he could instruct, that he had payed to, or for the use of my Lord *Sinclair*, any Sums of Money before the Creditors Diligence.

Yet some were of the opinion, That the Laird of *Hermanston* having Married my Lord *Sinclair's* Daughter, and having given the said Bond for the Annuity, dureing my Lord *Sinclair's* Lifetime, was a downright contrivance, contrare to the Act of Parliament 1621. to the end that the Right to the said Annuity, which if it had been taken in the person of my Lord *Sinclair* himself would have been lyable to his Creditors, might be so conveyed in the person of another, that it should not be lyable to the said Lord *Sinclair's* Debts; and being *ab initio* fraudulent, it continued still: And *Pilton's* applying any part of the same, for the use of my Lord *Sinclair*, was so far from purgeing the Fraud, that by the Act of Parliament, it was a clear evidence and probation of the same.

And yet they thought, That *Pilton* having out of respect to his Friend lent his name inconsideratly, he might thereafter for his security take, and the Exchequer might give *Herdmanston's* Liferent Escheat, upon the account foresaid; and the same cannot be thought to be to the behoof of my Lord *Sinclair*, unless it had been either procured by my Lord *Sinclair*, or granted expresly for his use: And as to my Lord *Sinclair's* own Liferent, His Majesty and Exchequer might qualify the Gift as they they thought fit; and His Majesty might have been concerned upon many considerations, that my Lord *Sinclair* should not want an Aliment; and might either have detained his Liferent in his own hands, in order to his Aliment, or given the same *sub modo*, and with the Burden thereof: And the said Gift was given asto the *Superplus* foresaid, for the Lord *Sinclair's* Aliment, not to be modified by any other, but by the Exchequer, and at their sight and direction, as the said Gift bears.

Upon the Grounds foresaid the Lords did prefer *Pilton* conform to the former Decreet. Sir *David Falconer* and others for the Creditors alteri *Dalrymple*.

D. 199. *Auchintoul* contra *Innes*. 10. Decem. 1674.

**T**HE Lords Found, That a person being pursued as representing his Father or other Predecessors, and denying the passive Titles, the same ought to be proven; and that the Defender, by proponing a Defence *in Jure*

*Jure*, as in the case in question, that Annuities were discharged by the late Proclamation, does not confess the passive Titles: But if he should propone a defence founded upon a Right in the person of his Predecessor, it would conclude him; so that he could not pretend that the passive Titles should be proven. *Newbyth Reporter. Vide 20. January 1675. Carfrae contra Talzifer.*

D. 200. *Stuart contra McDuff. 11. Decem. 1674.*

**I**N a pursuit for payment of a Sum of Money, It being Alledged, That the Pursuer had intrometted with Moveables and Goods, to the value of the Debt Lybelled pertaining to the Defenders Father, for whose Debt he was pursued; and that it was to be presumed, that he had got the saids Goods in satisfaction of the same Debt, unless he should alledge and prove an other Cause.

*The Lords Found*, That if the Defence should be proponed in these Terms, that the Pursuer had got the saids Goods in satisfaction, and that they were *data in solutum*; the Defence ought to be positive, and that the delivery of the Goods was probable by Witnesses; but the quality foresaid could not be proven otherways, but by the Pursuers Oath: But if the Exception was proponed, so as to infer compensation, *viz.* That the Pursuer had Intrometted with the saids Goods to the value of the Debt; that it ought to be verified *instante* by Write or Oath. *Castlehill Reporter. Hamilton Clerk.*

D. 201. *Home and Elphinston contra Murray of Stenhop. eod. die.*

**I**N a Competition betwixt an Assigney and an Arrester; *It was Alledged*, That the Assigney should be preferred, because the Assignment was anterior to the Arrestment; and tho it was not intimate, yet the equivalent was done, in sua far as, the Debitor being desired to make payment to the Assigney, and shewing his Assignment, did promise to pay the same, which upon the Matter, was like a Bond of Corroboration, which certainly would prefer the Assigney, notwithstanding he had not intimate his Assignment.

*The Lords Found*, That if the said Promise were verified by Writ, it should exclude the Arrester; but that it could not be proven by the Debtors Oath, in prejudice of the Arrester: And even as to the Debitor, the said promise could not bind him, being made in contemplation of a Right supposed to be in the person of the Assigney; Which being Found, not to be a valid Right, there were no reason that the Debitor should pay twice.

And whereas it was pretended, That if the Debitor had not accepted the Debt, and promised payment, the Assigney would have done Diligence, so that he would have been preferable to the Arrester; *The Lords thought*, that *sibi imputet* that he had not persifted his Right, as was Found before in the case of *Pitfoddels contra Donaldson. Forrest Reporter, Gibson Clerk.*



D. 202. *Moubray contra Arbuthnet.* 12. Decem. 1674.

**I**N a Process for the single avail of a Marriage; The Lords modified 9000 *Merks*, the Rent of the Lands being proven to be 3000 *Merks*; and it was thought, that the avail of the Marriage should be in all cases of that nature, 3. Years Rent.

D. 203. *Lord Balmerinoch contra The Tennents of Northberwick.* 13. Decemb. 1674.

**T**HE deceast Sir *William Dick* having charged the Lord *Balmerinoch* for payment of a great Sum of Money due by a Bond, granted by his Father, and diverse other Noblemen, who were Actors in the late times; and did borrow the said Sums for the use of the publick (as they called it) and the said Lord *Balmerinoch* having Suspended upon diverse Reasons, and also upon a Reason of Compensation Founded upon a Bond granted by the said Sir *William* to Sir *John Smith*; whereupon the said Sir *John* had a Right to the Lands of *Northberwick*; and had Assigned and Disposed the said Debt and Right in favours of the Lord *Balmerinoch*, by a Disposition and Assignment Blank in the name of the Assigney; and no Decreet being Extracted upon the said Process; and the Act of Parliament anent publick Debts, that no Execution should be for the same, having interveened;

The Lord *Balmerinoch* having filled up the said Assignment, in the name of *James Gilmour*, did intent in his Name, a Process for Mails and Duties, against the Tennents of *Northberwick*.

The Creditors of the said Sir *William Dick* pretending Right to the said Lands by diverse Infeftments, did compear in the said Process, and alledged, that the said Right, whereupon the pursuite was Founded, was extinct and satished, In sua far as, the said Lord *Balmerinoch* had Founded a Reason of Compensation upon the same, against Sir *William Dick*, which was sustained; and whereupon there was a Minut of a Decreet Suspending the Letters against Sir *William Dick* for the Debt above-mentioned: And that the said Assignment granted by Sir *John Smith* had been given up to Sir *William Dick*, or his Son Sir *Andrew*, as their Evident; for Exonering the said Sir *William* of the Debt compensed upon.

*It was Answered*, That there was no Decreet in that Process of Suspension, against Sir *William Dick*: And as to the said pretended Minute it was not produced: And whereas it was desired, that *William Dounie*, who was Clerk for the time, should be examined upon Oath concerning the said Minut; and the giving up the said Assignment to Sir *William Dick* or his Sons; It was urged, that the Minutes and Acts of Process could not be made up by Witnesses, *Et non creditur Clerico nisi quatenus constat ex Actis.* And 2. That there neither was, nor could be a Decreet in the said Process, In respect, the said Suspension was upon other reasons that were Relevant; and compensation being in effect satisfaction, and the last exception, the said Reasons ought to have been first discusst. *viz.* That there were diverse Arrestments at the instance of Creditors, which should have been purged; and that Sir *William* had Assigned the Debt whereupon he had charged, and the Assignment was intimate; So that

that the Suspenders could not be *in tuto* to pay; unless the consent of the Assignees were obtained, and that the said Sir William was at the Horn and his Escheat gifted, and that the Donator did not concur nor consent.

3. Tho' there could have been a Decree, and the Arrestments had been purged, and the Assignee and Donator consented; yet the same not being Extracted, the Suspenders might pass from his Reason of compensation, seeing *res* was *integra* before Extracting; and the Suspenders may eke and verify any other reason that is emergent: And there had arisen a most relevant Reason and Defence to him upon the said Act of Parliament anent publick Debts; of which he ought to have, and may plead the benefite, in regard Acts of Litiscontestation and Decrees are Judicial Transactions and Contracts: and as in other Contracts there is *locus penitentie* before they be perfited in Write, so in Acts and Decrees, before they be Extracted, Parties are not concluded: as *verb. g.* even after Litiscontestation before the same be Extracted, a Defence may be proponed; and in Declarators concerning Clauses irritant, tho Parties will not be admitted to purge after Sentence, yet before Extracting they will be heard: And even by the Common Law, albeit *ubi res transit in rem Judicatam, sententia non retractatur ex Instrumentis noviter repertis*; yet before Extracting of the same, if Writes be Found which will elide the Pursuers Lybel, they will be received.

*It was Answered* for the Creditors, That in this case *res* was not *integra*, because the Suspenders had so far acquiesced, that in effect he had payed the Debt, Compensation being equivalent; And if before extracting, he had made actual payment, there would have been no necessity of extracting the same; and in this case not only there was *solutio ipso Jure*, in respect of the said Compensation sustained; but *de facto* the Lord Balmerinosh had payed 3 or 4000 merks in satisfaction of the Debt charged for; the Compensation being so far short: and the Creditors had intented exhibition of a Discharge granted by Sir William Dick to the said Lord Balmerinosh, of the foresaid Sum of 4000 merks; and a Declarator, that in respect of the said Compensation, the said Right granted by the said Sir John Smith was extinct.

*The Lords*, at the desire of the saids Creditors, having examined diverse persons anent the said Minut, and the giving up of the said Assignment, and anent the having of the said Discharge, granted by Sir William Dick to Balmerinosh, the Creditors at length did pass from their Compareance. And now the Cause being again adviced, the Lords did adhere to their former Interloquitor in Anno 1664. And did Find, That before extracting, Balmerinosh might pass from his Reason of Compensation: and decerned in the said Process at Balmerinosh's instance, against the Tenants of Northberwick; Reserving to the Creditors their Action of Exhibition and Declarator as accords.

D. 204. Kinloch contra Rate. 15. Decemb. 1674.

THE deceast Mr. Robert Kinloch Portioner of Luthrie, having granted, after he was married, a Liferent Right to his Wife, by Infeftment in some of his Lands; in satisfaction of any further Provision: did thereafter give her an additional Jointure and Infeftment in other Lands; after which he did give a Right of Annualrent, forth of the Additional Lands, to his Daughter Janet Kinloch.

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The Daughter and her Husband Mr. *John Dickson*, did intent a Poin-  
ding of the Ground, upon the said Right of Annualrent; in which Pro-  
cess *Jean Rate* Relict of the said Mr. *Robert* compeared, and defended  
upon her foresaid Rights, being anterior to the said Infestment of An-  
nualrent.

*It was Replied* for the Pursuer, That as to the first Right for Provision  
of the Wife, she did not make question, but that being in Satisfaction  
of any other Provision, as said is; the additional Right granted there-  
after was for Love and Favour, and *Donatio inter virum & uxorem*;  
and revoked tacitely by the Pursuers Infestment of Annualrent.

*The Lords Found* accordingly, That the said posterior Right was re-  
voked by the Right of Annualrent *pro tanto*; without prejudice to the  
Relict of the *Superplus* if any be, the Annualrent being satisfied. *New-  
byth* Reporter. *Gibson* Clerk.

D. 205. *George Drummond contra Menzies of Rotwell.*  
16. December 1674.

**I**N the Process at the instance of *George Drummond* for payment of a  
Sum due by *Alexander Menzies* of *Rotwel*, as intrometter with the  
Debitors Goods: It was *Found* ( as in diverse Cases before ) That the  
pretence, that the Defunct was Rebel, and his Escheat gifted; doth not  
purge vitious Intromission; unless it be alledged, that the Defuncts Es-  
cheat was gifted and declared before intention of the cause; or that the  
Defender did intromet, either by vertue of a Gift to himself, or by War-  
rand and Right from the Donator for the Defenders Intromission, tho  
the Gift was not declared before the intention of the Cause; In respect if  
there was a Gift declared before the intention of the Cause, the Defender  
is in the same case, as if there were an Executor confirmed, before the  
intending of the Cause; and if he had either the Gift himself, or a Right  
from the Donator before he did intromet, his Possession *ab initio*, being  
by vertue of a Title, tho not perfected, cannot be said to be vitious;  
and *quisvis Titulus etiam coloratus*, purges the vitiousness of the intromis-  
sion. *Strathurd* Reporter. *Gibson* Clerk.

D. 206. *Kelhead contra Irving and Borthwick. eod. die.*

**J**ohn *Irving* Merchant in *Drumfries*, having furnished Mournings, Win-  
ding-sheet and others necessary for the Funerals of the deceased Earl of  
*Queensberry*; did take a Bond for the Sum of 1424 *merks* from the Coun-  
tess Dowager, Relict of the said Earl; which, tho it did bear only that  
Narrative, that the Lady was addebted to the said *John*, without relati-  
on to the Cause foresaid, yet it appeared it was for that Cause; In swa  
far as, the said Countess, being confirmed *Executrix* to her Husband, had  
obtained an Exoneration; and the foresaid Debt, contracted for the Fune-  
rals, was one of the Articles of the same.

The said Countess having deceased, the Earl of *Queensberry* her Son was  
confirmed Executor to her; and a Decreet being obtained against him at  
the instance of the said *John Irving*, for the foresaid Debt, he suspended  
upon multiple Poin ding against the said *John Irving*, and the Laird of  
*Kelhead*, and *James Borthwick*, and certain other Creditors.

The said Laird of *Kelhead* alledged, that he ought to be preferred as  
to



to the Goods confirmed by the said Earl, as Executor to the said Countess, because the said Countess was his Debtor in the Sum of 5000 *merks*; and to the effect he might be satisfied of the said Debt, had disposed to him her Moveables if he should not be satisfied in her own Lifetime; and that he had done Diligence upon the Disposition of the said Moveables by arrestment, and by taking Possession after the Ladies decease; and thereby had right to the Moveables confirmed by the Earl, and thereupon ought to be preferred.

Whereunto *It was Answered*, That the said Disposition did not give Right to *Kelhead*, unless Tradition had followed upon the same in the Ladies lifetime: and the Lady had not only retained Possession, but by the Conception and Nature of the Right, *Kelhead* could not have Possession, seeing he was to have Right to the Moveables after the Ladies decease, if he were not satisfied during her lifetime; so that he was in the case only of other Personal Creditors, and must come in according to his Diligence: and *Irving* and *Borthwick* were not only *prior* in Diligence, having obtained Decrees, but were privileged and preferable before all other Creditors, in respect the said *Irving's* Debt was of the Nature foresaid, for the defraying of the Funerals, and *James Borthwick's* Debt was for Drugs.

*It was Duplyed* for *Kelhead*, as to *Irving*, that any Privilege he pretended to, did cease; In sua far as the Debt was innovat, and was not a Debt upon the Executry of the Earl of *Queensberry*, but became a Debt of the Countess her self, who had given Bond (as said is) without any Relation to the Cause foresaid: And as to *James Borthwick*, there being two Debts due to him, one by Bond, and the other by an Accompt, the Bond did bear borrowed Money and Annualrent, and was not a privileged Debt.

*The Lords Found*, That *Kelhead* had no Right to the Moveables, by the Disposition foresaid, and was only a Personal Creditor: whereupon They *Found* also, that Debts of the nature foresaid, upon the account of Funerals, and of Drugs furnished the time of the Defuncts sickness, are privileged; so that the Creditors, tho they be not *Creditores Hypothecarii*, are *Privilegiati*, and preferable to other Personal Creditors.

They *Found* also, That *Irving's* Debt was still Privileged, notwithstanding that the Countess had given Bond for the same; seeing it did not bear borrowed Money, but only that she was addebted; and it appears by the Testament and Exoneration, that she was addebted upon no other account, but for the Cause foresaid.

They also did *Find*, That the foresaid Debts being Privileged, as to the Countess, they are Privileged also as to her Executor: and that *James Borthwick* should come in with the said *Irving*, as to his Accompt; but not as to his Bond: and as to it, was to come in with the rest of the Creditors. *Craigie Reporter. Gibson Clerk.*

D. 207. Captain Gordon and Ludquharne contra  
17. December 1674.

Captain Gordon a Privateer, having taken a Ship, named the *Wine Grape*, and brought the same to *Leith*; It was found a free Ship,  
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and not a Prize, by a Decreet absolvitor of the Admiral; in respect it appeared by the Pals, and other Documents, and the Declaration of the Company and Skipper, that it was a *Sveddisb* Ship: And albeit the Skipper was a *Hollander*, yet he was received Burgefs of *Stockholme*, and since the War he had transported his Domicile there: This Decreet being questioned by a Reduction before the Lords, upon that Reason, that the Admiral had committed Iniquity in giving the said Absolvitor, in regard the said ship was not a free ship; And it did appear from the Declarations of the Skipper and Company, that the Skipper was a *Hollander*; and a Partner of an eight part of the said ship: And after a long Debate, The Lords granted a Commission to the magistrates of *Stockholme* in *Sweden*, to examine such witnesses as either Party should desire, for clearing the point of Fact; and to examine the *Sweds* that were alledged to have interest in the said Ship and Loadning; and the Skippers wife who was then at *Stockholme*: And diverse persons and Witnesses being examined upon the said Commission, at the Instance of the Skipper and Defenders in the Reduction; and a Report being returned and advised: The Lords, in *July* last, did Find, That the said Report was a sufficient presumptive Probation, that the Skipper had fixed his Domicile at *Stockholme*, and that the Ship and Goods were free and did not belong to the Kings Enemies; The *Swedes* by the Treaty betwixt *Sweden* and our King being allowed to make use of *Hollanders* to be *Naucleri* and Skippers, *dummodo sint Civés & Incola*: and therefore decerned; superfeeding the extracting of the Decreet until *September*: and if the Pursuers should shew, that they had done Diligence upon the said Commission, the Lords declared they would grant a new Commission.

And thereafter an Agent *Matthew Colvil*, having gone to *Stockholme*, in behalf of, and for the Pursuer the Privateer; and having urged, that some Witnesses should be examined by the Magistrates there, upon the Points contained in the former Commission; upon that consideration, that no person was present for the Privateer, when the Witnesses were examined at the instance of the Defenders; and it was not the Pursuers fault, that he was not there himself or his Procurator, seing the said Mr. *Colvil* going there, and pursuing the said Commission, had made Ship-wrack by the way, and was forced to return back.

The saids Magistrates did refuse to proceed upon the said Commission to examine the said Witnesses, that had been formerly examined, or others pretending that the Commission was execute, and that they had examined both Parties and Witnesses upon the same: and did write a Letter to the Lords, shewing the Reasons whereupon they had refused.

This Session, the Cause being called *in prasentia*; the Pursuers did object against the said Report, whereupon the foresaid Interloquitor had proceeded; and in special, that the Depositions of the Witnesses examined at *Stockholm* were not transmitted; and that they were not so much as named in the Report: and that the Owners had refused to declare upon that Interrogator, *viz.* whether their Name was only borrowed for the use of the Kings Enemies, to colour and continue their Trade; pretending that they had given their Oaths already to that purpose, upon their obtaining of the Pals: and it was desired for the Pursuers that the Lords would proceed, without respect to the Report and Interloquitor fore-

said;

said; and advise and give their Sentence, whether, upon what was before them, the Reason of Reduction was proven.

Upon Debate among the *Lords*, It was urged, that they had given a Decreet already, but the Extracting was superseeded (as said is) conditionally, in order to the granting a new Commission: And the most that the Pursuer could desire in reason, was, that a New Commission should be granted: And all that was before the *Lords* being formerly advised, and a Decreet given thereupon, and the same standing, there was nothing now to be advised; but the Decreet ought to be Extracted, or at the most a new Commission should be given to the Pursuer.

The *Lords* notwithstanding, without respect to the said former Decreet, did proceed to advise and Vote, whether there was also much proven, as to condemn the said Ship.

It was urged by some of the *Lords*, That tho *res* were *integra*, and there were no Decreet; there is no Ground to adjudge the said Ship upon the pretences foresaid, feing the Skippers Oath being a Party had been taken upon the same; and he had declared upon Oath, that he had changed his domicile, and his Residence was at *Stockholme*; and his Oath being taken, they needed noother Probation, specially feing his Oath is admiculate with the Depositions of his Wife, and others taken upon the Commission foresaid at *Stockholme*; being positive, that he had Transported his Domicile there; and no other Probation was adduced to the contrary.

It was farder urged, That the Skipper being a Burgefs, and being for the time in *Sueden* with his Wife and his Child; The *Suedish* Owners were *in bona fide* to think, that he was such a person, as by the Treaty they might make use of as Skipper: And what ever could be pretended against him for his own interest, ought not to militate against them.

It was also urged, That His Majesty had written a Letter in favours of the Strangers, recommending them to the *Lords* Favour and Justice; and it would be thought a strange Return, that the *Lords* should condemn both the said Ship, and the Admirals Decreet absolutor, and their own former Decreet.

It was nevertheless Voted and Found by plurality, that the Ship ought to be adjudged upon the said pretences, that the Kings Enemy had the interest foresaid, both as Skipper and as Owner: diverse of the *Lords* dissenting.

D. 208.

23. Decemb. 1674. *inter easdem*.

THE *Sueds* having given in a Bill, desireing that feing they offered to prove *positive*, that the Skipper had changed his Domicile, they might have a Commission to what Judges the *Lords* pleased, for proving the said Alledgance; Some of the *Lords* were of Opinion, That the Alledgance being unquestionably Relevant was yet competent, In respect the *Lords* had by their Interloquitor Found, that they had already proven presumptively, that the Ship in question did not belong to the Kings Enemies; and also long as that Interloquitor stood, they needed not prove any farther; the *onus probandi* of the contrair lying upon the Caper: And the said Interloquitor being since reversed and taken away (as said is) It was neither needful nor competent until now, to offer to prove *positive* the said Alledgance.

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The Lords notwithstanding, Found by plurality, and by one Vote only, that the Alledgance was not now competent; the President being of a contrair opinion; but being carried by one Vote before it came to him, he could not Vote.

*Je me suis estendu trop sur cet Arrest, a cause que les plus habiles & scavans des Senateurs opinoyent pour les Estrangers, & Maistre du Navire: & aucuns des ceux qui estoient de l'autre costé, estoient parens ou aliez de Luthquharne, qui estoit Partie; & gaignoit par l' Arrest 2000 Livres Sterl: ou environ: & l' emportoit par une voix seulement.*

D. 209.

*Pitmedden contra Seaton. eod. die.*

**I**T was Found in the case Sir Alexander Seaton of Pitmedden, contra Seaton of Blair, That Pitmeddens Brother, tho he was Appearand Heir to a Baron, he could not have a Moveable Heirship; because he was not actual Baro. Some were of opinion, that as to that Advantage and priviledge of having a Moveable Heirship, it was sufficient that the Defunct was of that quality, that he was one of these Estates; seing a person once Baro, tho he be denuded is *semper Baro* as to the effect and interest foresaid: And a Prelate, tho for Age he should become unable to serve, and dimit, yet is still a Prelate as to that effect: And the Appearand Heir of a Baron, who has Right and *in potentia proxima* to be a Baron, and is Peer to Barons, and may be upon the Affize of Noblemen and Barons; if he should be prevented with Death before he be Infeft, it were hard to deny him the priviledge foresaid, that his Heir should have his Movable Heirship: And if his Heir would have the benefite as to a Moveable Heirship, his Intromission with the same ought to import a Behaviour. Lord Forret Reporter.

D. 210. Mr. David Thoirs contra Tolquhon. 2. Jan. 1675.

**M**R. David Thoirs, having acquired from John Forbes the Lands of Craigfintry, did pursue an improbation against the Laird of Tolquhon of a Bond and Compyring deduced thereupon of the said Lands against John Forbes of Gask, the said John Mr. David Thoirs's Authors Great Grandfather: And Certification being granted, and being urged that it should be Extracted; *It was Alledged*, that it could not be Extracted, but ought to be stopt; because the said Bond, whereupon the Compyring was deduced, and whereunto, and to the Compyring thereupon, Tolquhon has Right by progress, was granted to the deceast Mr. William Forbes Advocate, and Registrate in the Commissar Books of Aberdeen in Anno 1632; And the Extract was now produced; which after so long time, and the time of Troubles, the Registers being all in such disorder, ought to satisfy the production; being not only adminiculate, but also homologate in manner aftermentioned, by Patrick Forbes Grand-child and Successor to the Granter, and the said John Forbes the said Patrick's Son; In suafar as the said Bond was granted to the said Mr. William Forbes a person above all exception; and all possible Diligence, both real and personal had been used thereupon by Horning, Compyring, and Caption: and that the Granter had Suspended the said Bond upon diverse Reasons, and

and did never question the truth of the same; and Disposed his Estate to *Patrick Forbes* his Apperand Heir, with the burden of his Debts; and it cannot be thought, but that he understood the Debt in question, to have been comprehended under the general of Debts, having been so much distressed for the same: And that the said *Patrick* did homologate the truth of the said Bond; In sua far as by a Minute of Contract betwixt him and *Tolquhon*, he had taken a Right from *Tolquhon* to the said Bond and Compyring; and was obliged to pay for the same the Sum thereinmentioned: And the said *Patrick* having Disposed to his Eldest Son *William* his Estate, the said *John* was served Heir to the said *William* his Brother; and had homologat also the said Bond by Contract betwixt him and *Tolquhon*, whereby he disposes the Lands Compyrsed of new again to *Tolquhone*, and ratifies the said Apprying and Grounds thereof: Which Contract, albeit when the said *John* was Minor, was made with consent of his Friends and Lawyers most deliberately; the said Mr. *David Thoirs* being one of his Lawyers; And therefore, tho it might be questioned upon Minority, as to any prejudice or disadvantage the Minor may pretend to have by the same, yet it will stand as an Homologation of the said Bond as to the truth of the same; unless it were offered to be improven, by a positive qualification of Falshehood.

The Lords having considered the Inconvenients on either side, if certifications for not production of principals should be loosed, being the great surety of the People: And on the other part, if they should be Snares, and Parties should pursue maliciously Improbation, having *viis & modis* got the principal Writes out of the Register, or known they had miscarried: They Found, In respect that Mr. *David Thoirs* having taken a Right, after the matter was litigious by a Charge and Suspension of the Minute, betwixt *Tolquhone* and the said *John Forbes* the Great Grand-child; so that the said Mr. *David* was in the same case, as if the said *John* were Pursuer, and was content to state himself in that case; And in respect of the Specialities of this Cause, and Adminicles and Homologations foresaid, that therefore the said Extract ought to satisfy the Production, and the Certification ought not to be Extracted.

D. 211. *Pittarro contra E. Northesk.* 5. January 1675.

THE Earl of *Northesk* having taken an Affignation to a Bond, granted by the deceast Laird of *Craige* and Earl of *Dundee* to *Margaret Carnagie*, and her Children for 1000 Merks, and having Compyrsed thereupon *Craigs* Estate; he did after the Compyring give a Bond to the said *Margaret Carnagie* and her Children, that in case he should recover payment, he should make payment to them of the foresaid Sum: Sir *David Carnagie* of *Pittarro*, being Debitor to the said Earl in the Sum of 2000 Merks, Suspended upon that Reason, that the said *Margaret* and her Children had Assigned to him the said Back-bond granted by *Northesk*; and that the said Earl had Disposed the Right of the said Apprying to the Lord *Hattoun*; And therefore became Lyable to pay the said Sum to the Suspenders Cedent, and the Suspenders may and does compense upon the said Bond *pro tanto*.

It was Answered by the Charger, That the Compyring did neither belong to the Suspenders Cedent, nor was to their behoof; the said Bond

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granted by the Laird of *Craig* being Assigned *ab initio*, without any Back-bond: And the Compyring being deduced before *Northesk* granted the said Bond: And by the said Back-bond he was obliged only to pay the said Sum in case he should get payment, and he was so far from getting payment of the said Sum, that having compyried not only upon the said Bond granted to *Margaret Carnagie*, but for other Debts exceeding far the said Debt due to her; yet got payment of neither.

*It was Replied* by the Suspender, That he was not concerned to Dispute, whether he got payment or not; but the Charger having Disposed the Compyring as to the said Sum, without the consent of the said *Carnagie* and her Children; and without the Burden of the said Back-bond, it was equivalent as if he had got payment; it being all one upon the matter as to the interest of *Carnagie*, whether *Northesk* had got payment of the said Sum, or had disposed the Compyring in sua far as concerns the same.

The Lords, In Respect of the conception of the Bond granted by *Northesk*, Found, That either he should procure a Retrocession of the said Bond and Compyring thereupon *pro tanto*; or that he should pay the Damage and Interest sustained by the Suspenders Cedent, through *Northesk's* granting of the Right of the said Bond and Compyring to *Hattoun*: And in that case, that the Damage and Interest should be presently liquidate; and being liquidate should be a ground of compensation. *Glendoch Reporter. Monro Clerk.*

D. 212.

*Eod die.*

**I**T was debated this day among the Lords, whether a Bond being granted by a principal and two Cautioners bound conjunctly and severally; and the Cautioners not bound to relieve one another; if one of the Cautioners should take Assignment to the Bond and should pursue the other, the said other Cautioner will have a defence upon that Ground, That albeit they be not obliged to relieve one another *pro rata*, yet that the said obligation *inest*, in sua far as, they are bound conjunctly and severally: Most of the Lords enclined to find, that the pursuer ought to relieve the Cocautioner *pro rata*, and had not action but for his own part. But some of the Lords were of another opinion; that there being no obligation upon any of the Cocautioners to relieve one another; one of the Cautioners paying entirely and getting an Assignment, in effect *emit nomen*: And tho both the Cautioners be obliged conjunctly and severally in relation to the Creditor, yet there is no Transaction or obligation betwixt the Cautioners themselves; every one having *actio mandati* as to the principal for their relief, which *inest*, tho the principal were not bound to relieve them expressly: but ought to be considered as *quilibet*, and Strangers one to another.

But because the Lords were divided, and it was alledged on either hand, the case was formerly decided; the Decision was delayed this day; *Vide infra* 28. January 1675.

D. 213. Laird of *Hempfield* contra *Bannantine. eod. die.*

**T**HE Laird of *Hempfield* with certain Cautioners for him, having granted a Bond of 6000 Merks to the deceased *James Bannantine* and his Wife, the longest liver of them two; and after their decease to *John Bannantine*



*natine* their Son; whereupon Inhibition was execute against the principal and Cautioners: And the said *John Bannantine* did pursue a Reduction and Improbation against these who had acquired Rights, after the Inhibition.

*It was Alledged,* That the Pursuer had no interest, because the said Bond was Blank in the name of the substitute, and the pursuer could not be understood to be the Bairn to whom the Sum is to be payable after the decease of his Father and Mother, seing he was not born the time of the granting of the Bond: And as to the Inhibition it was not at the instance of the Pursuer, but of his Father and Mother.

*It was Answered,* That the Bond was opposed, bearing the Pursuers Name; and tho the Bond had been Blank, and the Pursuer not born when it was granted, the Father might have filled up any of his Bairns Names as he thought fit: And as to the Inhibition, it was at the instance of the Father *James Bannantine* who was Fiar; and did accresce to the Pursuer, being substitute in the Fee after his decease.

*The Lords Repelled the Alledgance.*

It was thereafter Alledged, That the Pursuer was satisfied of the Debt, in sua far as either the Debitor or Cautioners had payed the same, at least a part thereof, and did satisfy *pro tanto*; or some other persons, having acquired their Lands after the Inhibition, had given Money to the Pursuer or his Father, to pass from the Inhibition as to them, which ought to be allowed as payment *pro tanto*.

*It was Answered,* That the Alledgance is not Relevant, unless it were in these Terms, that the Pursuer or his Father had accepted what was payed by the saids persons in satisfaction of the Debt *pro tanto*; otherwayes, that there is no *solutio*, but only a Transaction betwixt the persons foresaid, and the Pursuer, to free themselves from Trouble and of a Plea; and what was given, was not in satisfaction of the Debt in whole or in part, but upon the account foresaid: And seing the Creditor having inhibited; so that his Inhibition did affect diverse Lands, or having diverse persons bound to him as Cautioners, might warrantably pass from his Inhibition as to some of the Lands, and discharge such of the Cautioners as he thought fit; he might also take a consideration for doing the favour foresaid.

*The Lords thought,* That if it should be allowed to Creditors to make such Transactions; and what they should get upon account of the same should not be allowed in payment, they might get more nor the double of their Debt; at least more than Principal and Annualrent; and that it would be the occasion of usury. They Found the Defence Relevant, that what should be proven to be given *eo nomine* should be imputed in satisfaction. *Gibson Clerk.*

D. 214.

*Innes contra Innes. 7. January. 1675.*

**B**Y a Contract of Marriage a Sum being provided to the Husband and his Wife, and to the Heirs Male of the Marriage; whilks Failzieing to the Fathers Heirs Male whatsoever: An Inhibition upon the said Contract, at the instance of the Eldest Son of the Marriage, and Reduction thereupon was not sustained; because the Father was living, and the Son neither was, nor could be Heir to him, In respect the Father

was

was living: And tho he were dead the Son could have no Right, unless he were Heir, in which case he would be obliged to warrand. *Glen- doich Reporter.*

D. 215. Laird of *Lufs* contra E. of *Nithsdale*. *ead. die.*

**A** Bond being alledged to be granted by the Earl of *Nithsdale*, in anno 1621, to one *Colquhoun* and his Wife, for 6000 *Merks*: And a pur-  
suit being intended thereupon; *It was Alledged*, That the Bond was most  
suspicious, being so Ancient and nothing done thereupon; and in re-  
spect of other great presumptions, *viz.* the quality and condition of the  
said *Adam* when the said Bond was granted, being designed the Earl's  
Servant: And that it was improbable, he could have so much Money to  
lend his Master, or that he and his Heirs should have so long wanted the  
same: And that it appears, that the Bond has been Blank *ab initio*, the  
Creditors Name being filled up with another Ink: And the said *Adam*  
being designed to have been the Writer of the Bond; and yet where it  
bears that he is Writer, it does not bear the said *Adam*, which it would  
have born if his name had been filled up from the beginning: And it ap-  
pears, that the Earl being known to be a person negligent, and being at  
*London* for the time, and having to do with Money, might have given  
the Bond to the said *Adam* his Servant for raising of Money, and that he  
forgot to call for it.

*The Lords Found*, That the said Bond could not be taken away upon  
the presumptions foresaid; unless it were either preserved, or the De-  
fenders would offer to improve it. *Gibson Clerk.*

D. 216. *McIntosh* contra *Frazer*. 9. January. 1675.

**McIntosh** pursued *Frazer* of *Streichan*, for payment of a Sum due upon  
Bond; In which Pursuite two Defences being proponed, *viz.* Pre-  
scription and Payment; and a Reply made to the first, *viz.* Interruption  
by a pursuit; and *Litiscontestatio* being made upon the Defence of pay-  
ment and the said Reply; *It was Alledged*, when the Cause was to be ad-  
vised *contra producta*, *viz.* That the Summons and Execution thereupon  
produced, for proving Interruption, did not prove the same; In respect  
the Summons were never called, nor any Document taken in Judgment  
thereupon. And as to the Discharge produced, *It was Alledged*, That it  
was granted by the persons thereinmentioned as Curators to the Pursuer,  
and was not subscribed by the Pursuer himself as it ought to have been;  
there being a great difference betwixt Tutors and Curators; In respect  
Tutors must act for the Minor, and are Authors as to all deeds done by  
them; but Curators do only concur and ought to advise and consent to  
the deeds of their Minor, which otherways are not valid.

*The Lords* did Find the Discharge did not prove; and it could not be  
obtruded to the Pursuer who had not subscribed the same; and did also  
Find that the Summons and Execution did sufficiently interrupt. *Con-  
cluded cause.* Actor *Falconer* alteri *Season*. *Monro Clerk.*

D. 217. Town of Edinburgh contra Earl of Loudoun. eod. die.

**T**HE Lady *Teſter* having Mortified a certain Sum of Money for the Poor in certain Paroches in the *South*; and having employed to the End foreſaid the foreſaid Sum upon Bond or Contract, granted by the Town of *Edinburgh*: The Miniſters of the ſaid Paroches did purſue the Town of *Edinburgh*, to hear and ſee the Tenor of the ſaid Write to be proven; and that being done, that they ſhould be decerned to pay: And did ſufficiently prove the Tenor of the ſame.

In the Proceſs againſt the Town, There was a Defence proponed, *viz.* That my Lord *Loudoun*, who had Intereſt in the ſaid Mortification, had got payment of the ſaid Sum from the Town of *Edinburgh*, which they offered to prove by his Oath.

The *Lords* having Ordained his Oath to be taken before Answer; And he being Summended to that effect, he was holden as confeſt: And having thereafter upon a Bill, Deſired to be Reponed to give his Oath, and being Reponed, he was holden as confeſt the ſecond time: And in reſpect that the ſaid Defence was not proven by his Oath, The *Lords* proceeded and decerned againſt the Town.

The Town of *Edinburgh* having intended Proceſs againſt the Earl of *Loudoun*, for reſounding the ſaid Sum; upon that *medium*, that the ſame was formerly payed to him; and that he had confeſſed, at leaſt was holden as Confeſt, which is equivalent as to the payment of the ſaid Sum.

*It was Alledged*, That his being holden as Confeſt, in the Proceſs foreſaid did operate only that the Defence referred to his Oath was not proven, but could not be a Ground of purſuite againſt himſelf, unleſs it were proven by his Oath, that the ſaid Sum was payed to him; and he deſired to be Reponed to his Oath; *It was Answered*, That he being twice holden as Confeſt, there was no reaſon to Repone him, and his being holden as Confeſt doth operate in Law alſemuch, as if he had confeſſed the ſaid Sum; Seing through his Contumacy the Purſuers are prejudged: And he cannot pretend, that he was not a Party in that Proceſs, ſeing he was holden as Confeſt, and in the ſame Proceſs craved to be Reponed, and was Reponed as ſaid is: And tho he had not been called *ab initio* in that Proceſs, yet being called *incidenter* for proving of an Alledgance; by the certification foreſaid he became Partie therein: And as when an incident Diligence is raiſed againſt a haver of Writes, for proving of an Alledgance; and the having thereof is referred to the Oath of the Defender in the incident; if he be holden as confeſt, tho the Alledgance be not proven, the Purſuer of the Incident will have Execution againſt him as Haver; and for the Damage and Intereſt ſuſtained through his Contumacy; ſo it ought to be in this caſe.

The *Lords*, Tho the Earl of *Loudoun*'s presumptive Confeſſion (being holden as confeſt as ſaid is) be a convinceing evidence, that the ſaid Money was payed to him; yet they had that reſpect to him both as to his quality and integrity, that they would have Reponed him, if he had compared himſelf; or had written to the *Lords*, that he deſired to be Reponed; and did intimate alſe much to his Procurators: and to that effect did give ſome time, but no Return being made, they proceeded, and ſuſtained the

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pursuite at the instance of the Town of *Edinburgh*, upon the *medium* foresaid. *Monro* Clerk.

D. 218. Letter by the Lords of Session to the King.  
12. January. 1675.

**M**Y Lord *Lauderdale* His Majesties Secretary, having writen to the President, concerning the abovementioned Process betwixt Captain *Gordon* and the *Suedes*, anent the Ship called the *Wine Grape*, That the *Suedish* Envoy had made Application to his Majesty, and had represented, That the Decreet against the Strangers, was caryed but by two Votes; and had given in a List to his Majesty, of those that were for, and against the said Decreet, with diverse Reasons against the same. It was thought fit, that a Letter should be drawn to His Majesty, containing the Grounds, whereupon the said Decreet proceeded; which being done by those who were appointed by the Lords; some of the Lords did object against the same, That they did mention the Lords indefinitely to have given the said Decreet; Whereas His Majesty was informed of the contrary, and the Information was true; and therefore it was desired it should bear, That, upon the Votes of the *major* part, which is usual in all Cases, the Decreet was pronounced: Specially, seing the said Letter did containe the Grounds of, and did assert the Justice of the said Decreet: So that these, who had voted against the same, could not belye themselves, and put under their hand the contrarie of what they had voted. And albeit in all Judicatories, even in Parliament, what is done by the plurality doth overrule and conclude the Dissenters, so as to submit to the same: Yet they are not obliged to maintain or assert the Justice of a Sentence and Act, that they had been against in their Judgment and vote.

It was, notwithstanding, carryed by plurality, That without the amendement foresaid the Letter should be subscribed by all the Lords; the President having promised to write to my Lord *Lauderdale*, what was truly *res gesta*, when the said Decreet was given: And upon that assurance, some of the Lords declared when they subscribed, that they subscribed not their own sense, but the sense of the Court: And though they were concluded, as said is, yet they were not convinced.

D. 219. Glendynning contra the Earl of Nithsdale.  
13. January. 1675.

**W**illiam Glendinning having pursued the now Earl of Nithsdale as Heir to Robert the late Earl of Nithsdale his Father, for fulfilling a Minute betwixt the said Robert Earl of Nithsdale and William Glendinning of *Lagan*, from whom the Pursuer had Right: and for payment of the half of the duty of the Lands of *Douphinstoun*, conform to the said Minute: and Litiscontestation was made in the cause: and for proving the rent of the saids Lands of *Douphinstoun*, It was craved, that the Depositions of witnesses, that had been adduced in the like process, intended against the said Earl, as representing his Father for implement of the said Minute, should be received in this Process: But the Lords having considered, that the said Earl did not represent his Father *active*, but

but was pursued only upon the passive Titles; and that this process against the now Earl, is not against him as representing the last Earl; neither was it alledged that he represents him; Therfor they Found; that the said Depositions could not be repeated in this process; Seing *res* was *inter alios acta*; and *acta in uno iudicio non probant in alio, nisi inter easdem personas*; or these who represent him.

D. 220. Edmiston contra Mr. John Preston. eod. die.

**W** Auchope of Edmiston and his Lady, as Executors to the deceased James Raith of Edmiston, pursued Mr. John Preston lately of Halthrie Advocate, for payment of the Tack duty for a Seam of Coal, belonging to Edmiston, and set to him for certain Years.

It was alledged for the Defender, That he ought not to be lyable for the Years in question; because, having entered to the Possession of the said Coal, and having payed the Duty for the time he possessed; he was forced to cease from working, in respect the said Coal came to be in that condition, that it could not be wrought, partly by reason of the defect of Roof, so that the Coalziers neither would nor could work without hazard; and partly by reason of bad Air. It was Replied, That the Defender having accepted a Tack of a Subject, lyable to such hazards, *eo ipso* he had taken his hazard; and was in the case, as if he had acquired a Right to *jactus retis*.

It was Duplyed, That *alea* and *jactus retis*, and *spes in venditione*, may be, and is understood to be sold; but in *Locatione*, *spes* and *alea* is not thought to be set, unless it appear by the Contract, that the Conductor should take the hazard; seing it is *de natura* of Contracts of Location, that *fruitio* is understood to be given and set; and that *merces* should be payed *ex fructibus*. And where the Conductor cannot *frui*, upon occasion of an insuperable impediment, which does not arise, either from his dole, or *culpa*, or negligence, as in this case; *remittitur merces*: as is clear, not only when the thing that is set is a subject, not lyable to so much hazard, but when it is contingent, as when Gabells or Customs are set, or Fishings, or Milns, or Coals, if there fall out such an impediment, as doth interrupt the fruition and *perceptionem fructuum*, as if there be Pest and War in the case of Customs; or if Herring should not be got at all; or if upon occasion of inundation, Milns should be unprofitable; or Coalheughs should be drowned or burnt.

The Lords, before Answer, Thought fit, that there should be conjunct Probation allowed to both Parties, anent the condition of the Coal; and the Defenders desisting and ceasing from working thereof, and the Occasion of his desisting; and if the impediment was insuperable. Craigy Reporter.

D. 221.

eod. die.

**A** Pplication being made to the Lords by a Bill given in by a Widow, Desiring, that she may be allowed to intromet with the Cropt and Goods pertaining to the Defunct, without hazard of vitious Intromission:

The Lords thought, That such Warrands being *Voluntarie Jurisdictionis*, and the Commissaries being entrusted, for securing the Estate of Defunct persons to the nearest of Kin, and Creditors, and other persons having interest;

est; did Remit the Petitioner to the Commissars of the place. Sir David Falconer Younger was for the Petitioner and subscribed the Bill.

D. 222. *Meldrum contra Tolquhone.* 20. January 1675.

**I**N a Declarator of *Escheat* at the instance of *Meldrum contra Tolquhone*: *It was Alledged*, That the Horning was Null, because the Party was Charged only upon six days, albeit he dwelt benorth the Water of *Dee*: And by the Act of Parliament 1600. cap. 25. All Charges of Horning against persons dwelland benorth *Dee*, should be upon 15. dayes at the least: And by the 138 *Act Parl.* 12. K. Ja. 6. It is statute, that in case any Denunciations of Hornings should be at the Mercat Cross of *Edinburgh*, upon Charges, upon unlawful and impossible Conditions; the same, and Horning thereupon should be Null: And that there was a Decision in *Duries* Book in Anno 1625, that Hornings even upon Bonds against persons benorth *Dee* were Null.

*It was Answered*, That the Act of Parliament in Anno 1600, was only in the case of Hornings upon Citations or Charges to find Law borrowes, or for compearing before the Council, as appears by the narrative of the said Act which doth interpret and regulate the dispositive Words of the Act.

And that the Act of Parliament in Anno 1592. doth not militate in the case of Hornings upon a Clause of Registration, seing after that Act until the said Act 1606, such Clauses that Hornings should be upon 6 dayes, were not thought, and *de facto* are not impossible.

And as to the practique, *It was Answered*, that there was a late practique in Anno 1664, upon a Debate in the Innerhouse, in the case of *Philorth contra Frazer*; Whereby it was *Found*, That the Act of Parliament 1600. is to be understood, in the case foresaid, where Hornings are upon Charges of the nature foresaid, for appearing before the Council, and such like; but not in the case in question and others of that nature, where Hornings are upon Bonds, and Clauses of Registration thereincontained, which do bind, and cannot be questioned by those who do oblige themselves.

The Lords considered, that the narrative of the said Act doth clear the meaning of the dispositive words; and there needed not to be a Law and remedy as to Hornings upon Clauses of Registration, seing Parties could not help themselves as to Charges to compear before the Council, and others of that nature without a Law: But they were Arbiters, and could make a Law to themselves, as to Clauses contained in Contracts or Writes, if they thought them grievous or impossible: And that there appeared to be a singularitie in the case mentioned by *Durie*, seing the Charge was given in *Orkney* upon 6 dayes, which could not well be satisfied: And therefore the Lords, for the reasons foresaid, did sustain the Horning. Actor *Hog* and *Thoirs*: alteri *Falconer* and *Forbes*. *In presentia*.

D. 223. *Carfrae contra Telzifer.* eod. die.

**A** Person being pursued as representing a Debitor, upon that passive Title, that he had behaved himself as Heir to the Defunct; In sua far as being conveyed at the instance of another Party, he had proponed



a peremptor Defence: The *Lords Found*, That the proponing of a Defence upon payment or such like, was not such a Deed as could infer the Passive Title of *Behaving*; unless it were adminicled with Intromission or otherways. *Nevoij Reporter. Hamilton Clerk. Vide 10 December 1674.*

D. 224. *Chalmers contra Ferquharson and Gordon.*

22. January 1675.

**T**HE *Lords Found*, That a Person being Pursued as Intrometter; and having Alledged, that before the intention of the cause she had obtained a Gift of her Husbands Escheat, the said Defence is Relevant: And that after Intromission, there being a Donator confirmed before intention of the Cause, or the Intrometter obtaining a Gift tho not declared, there being no necessity to declare the same against her self; that the same doth purge even Intromission before the Gift. Some of the Lords were of another opinion, upon that Ground, that *ipso momento* that the parties intromet, there is a Passive Title introduced against them; which doth not arise upon the intention of the Cause, but upon their own Act of behaving; and *Jus* being *semel quassum* to Creditors cannot be taken from them, except in the case of an Executor confirmed before the intention of the Cause; against whom the Creditor may have Action: And that there is a difference betwixt a Donator having declared, and an Executor having confirmed; In respect the Executor is lyable to Creditors but not a Donator; and an Appearand Heir having become lyable by intrometting with Moveable Heirship, and behaving as Heir, his Intromission is not purged by a supervenient Gift; seing his immixing is *Aditio facto*; and there is *eadem ratio* as to Intrometters, who are Executors *a tort* (as the *Englisb Lawyers* speak) and wrongously: And in effect, by their Intromission *adeunt passive*, and are lyable to Creditors. *Strathurd Reporter.*

D. 225. *Jean Maxuel contra Mr. William Maxuel.*  
*eod. die.*

**M**R. *William Maxuel* Advocate, being pursued at the instance of *Jean Maxuel* natural Daughter to *Sprinkel*, for 5000 Merks Alledged due to her by Bond, granted by the said Mr. *William*, which she did refer to his Oath; did give in a qualified Oath, Declaring that he had granted a Bond to the Pursuer at the desire of her said Father, but the same was never delivered; and was so far from being effectual, that by the expresse order of *Sprinkel*, he was not to deliver the same to the Pursuer without his warrant; and that he had given him order to destroy the said Bond, in consideration that he was not satisfied with the Pursuers carriage; and that he had left her a Legacy, which the Defender had payed. This quality was thought to be so intrinsic, that his Declaration could not be divided, so as to prove the granting of the Bond, and not the Quality; Specially seing the said Quality was adminiculate with Letters, which the said Mr. *William* did produce, which were written by *Sprinkel* to the same purpose: Yet by plurality, It was *Found*, that his Oath proved the Lybel; and Decreet was given against him. Thereafter the said Mr. *William* obtained a Suspension upon that Reason, that the Decreet was

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Extracted by favour of the Clerks, not without precipitation; after that he had applyed to the Lords, and desired that the case might be reconsidered: And that the Lords had Ordained the Decreet to be brought back; and because the party refused, they past a Suspension.

The case being debated *in praesentia*; The Decreet *in foro* was obtruded, and that it was just upon the matter; seeing as to not delivery, It appeared by his Oath, that he was trusted to the behoof of the Pursuer, and was in effect a Depositary, so that he could not cancel the said Bond without consent of the Pursuer: To which *It was Answered*, That the Decreet was Extracted as said is, and that immediatly upon the pronouncing of the same, he had applyed to the Lords to the effect foresaid; And it cannot be said, that he had any Trust from the Pursuer, but only from her Father: And tho he could be thought to be a Depositary; the manner and quality and terms of the Deposition, could not be proven otherways, but *Scripto* or *Juramento*.

The Lords notwithstanding, Thought they were concerned to adhere to the Decreet being *in foro*; least their Decreets should be obnoxious to that prejudice that even when they are *in foro*, they may be questioned and altered; Some of the Lords were of the opinion, that the great consideration the Lords should have, is to do Justice, and that the party having omitted nothing upon his part, neither before nor after pronouncing of the same; and upon the matter the reason of Suspension as to the point of Justice and Law being unanswerably Relevant, It was hard that a Party should be grieved upon a pretence of form; there being a singularity in this case upon which the Honour of the Lords may be saved, *viz.* That the said Decreet was Extracted with too much precipitation.

D. 226. *Joynt Petition of the Advocates.* 26. January 1675.

A Joint Petition was presented by the Advocates that had withdrawn; whereby they did not expressly desire, that they should be readmitted, but did hold forth that they were free of, and hated the very thought of Sedition, and that the Lords who did best know the Reasons of their withdrawing would vindicate them to His Majesty; and that they were willing to serve with that freedom which their predecessors had formerly, and which they conceived was no more than was necessary for these of their station, in order to the interest of the People, that they acknowledge and were willing to submit to the just Power of the Lords, as their predecessors had enjoyed the same, and desired that the Petition should be transmitted to His Majesty as satisfactory. Some of the Lords thought, that the Petition was altogether dissatisfactory, and should be thrown over the Barr, being as to the manner, in a joint and Factionous way; And as to the matter, no ways satisfactory, insinuating a qualification of the Lords Power, and their Submission; and that the Lords pretended to a Power which their Predecessors had not, and that was not just.

Others of the Lords were of the opinion, That whatever mistakes there might be as to the manner, It was hard upon that account to reject it: and that if the time was not so pressing (that which was appointed for Addresses being to Elapse the very next day) it might have been helped as to the manner, by giving Intimation to the Advocates, that it would not satisfy; But there being no time for that, and the certification being so high and heavy

heavy, *viz.* utter and perpetual incapacity; it might be justly said, as it is Reported, a Judge in *England* had said in the case of a person accused of Theft, whom he inclined to favour by reason of the meanness of the value of the thing that was stollen, being a Watch of Brass only, and the matter of the Watch being beneath that value which the Law of *England* requires for punishing Theives Capitally; And it being Alledged, that the Fashion with the Matter did exceed the value foresaid, It is said, that he Answered, That he would take no Mans Life for the Fashion, and it were hard, for the Fashion and *modus*, and the way of Address to take from so many persons their Livelyhood, and from the Countrey their Service, that was so necessary to them. And that the Advocates fault being a Joint-withdrawing, they might conceive that the expiation of the same should be by a joint Address; And yet the Petition was not joint as to all the Advocates concerned, many having given in and being to give in several Petitions: And as to the matter it was Represented, that though the Petition is general, yet the generals therein contained do imply the particulars that would be satisfactory, seeing the Lords did not pretend to any power, but that which was just, and no violation was intended of their Liberties, neither was any innovation introduced or obtruded upon them or their carriage in their station. Upon all which, *It was thought*, that the Petition should be transmitted simply, to the effect it might import Interruption of the Prescription and Certification; any Acts of Interruption even *quales quales* being sufficient: And the more short that the Prescription be, and the higher the Certification and prejudice of Prescription, as in this case; the Interruption being the more favourable.

The Lords notwithstanding, *Found*, that the Petition not being satisfactory, could not be transmitted to any effect. And yet did declare, that albeit the Proclamation was conceived in these terms, *viz.* That if the Advocates should not give satisfaction betwixt and the 28. day; if they should apply upon the 28. day, their Application should be thought to be within the time contained in the Act: And that in stile of Law, these words, *betwixt and a certain Term*, does not exclude the day of the Term.

They declared also, That the Petition being dissatisfactory upon that account amongst others, *viz.* That they did not offer satisfaction, nor desire to be readmitted, That Petitions being given in severally, and bearing that they desired to Re-enter, and were willing to give satisfaction conform to the Kings Letter and Proclamation, should be received and transmitted as satisfactory.

D. 227.

*Eod. die.*

UPON a Bill, the Lords *Found*, That Parties having a joint and equal Interest in Lands and Tenements; both as to the Right it self, being disposed to them jointly, and as to the respective Proportion and Parts of the said Tenements; the principal Writes should be kept by such as offered Caution to the other Portioners; and that Transumps should be given to the other Persons concerned upon the Common Charges of them all.

D. 228.



D. 228.

27. January 1675.

**I**N the case abovementioned, 5. January instant, concerning Con-cautioners obliged conjunctly and severally for the Principal, without a clause of mutual Relief: *The Lords Found*, That one of the Cautioners having payed and taken Assignation, the others had a good Defence against him for his own part, notwithstanding of the Reasons there abovementioned; and that it was urged, that the Co-cautioner could not be forced to relieve the Defender if he had payed the whole; seeing he had neither *actio mandati*, there being none given by either of the Cautioners to others; nor was obliged to relieve the other Cautioners by an express Clause, which is ever insert, when mutual relief is intended: And that this is clear Law, it appears from the Title of the Civil Law *de Fidejussoribus ff. lib. 46. Tit. 1. leg. 39. Et leg. 36. ibid. Et. Leg. 11. Cod. eod. Tit.*

The Lords Decided, as said is, In respect of a Practique produced betwixt in anno relating to a former Practique in anno

D. 229. The Minister of Tulliallane contra Colvill of Larg and Kincardne. 28. January 1675.

**I**T was Found by the Lords Commissioners for Teinds, That the Heretors of Lands, having Right *cum decimis inclusis* were not lyable to the Augmentations of Ministers Stipends; and that no Locality could be given out of their Teinds, the saids Insements being before the Year 1587. And that the Feu-duty payable to Church-men for Stock and Teind in Victual, was not lyable thereto; because the Teinds not being separate from the Stock, and the Heretors having Right to the Lands free of Teinds, in effect there were not *decime*: And by the Acts of Parliament, and the Kings Decreet Arbitral, Teinds are lyable to Ministers Feu-duities, in consideration that the Lords of Election and Titulars, had Right thereto from the King since the Act of Annexation: And that the King, who might have questioned their Rights, was pleased by the said Acts of Parliament, and Decreet Arbitral, to affect them with the burden of Ministers Stipends; whereas such Rights *cum decimis*, were granted by Church-men, and did not flow from the King, but from them, at such time as by the Law then standing, they might have granted the same.

D. 230. Doctor Hay contra Jamieson and Alexander.  
*eod. die.*

**G**Eorge Steuart Advocate, having comprised from Con, the Lands of *Artrochie* and others; did dispose the said Lands and his Right of Comprising to Neilson: and thereafter the said *Neilson* failing in payment of the price, the said *George Steuart* did Comprise back from the said *Neilson* the said Lands: and *Andrew Alexander* did also comprise from the said *Neilson* the said Lands, and his Right foresaid.

Doctor Hay, Having also comprised from Con the foresaid Lands, pursued an Improbation of the said first Comprising, at George

George Steuart's Instance; and having called thereto the said George Steuart and Neilson, and Marjorie Jamison, who pretended Right to the said Lands; he did obtain a Certification against two Bonds, which were the Ground of the said Comprising; upon Compearance, and a long Dependance, and long Terms assigned for producing the said Bonds: And thereafter the Doctor pursued a Removing from the said Lands, against the said Andrew Alexander and others: And it was Alledged for the said Alexander, That he had Right to the said Lands, and was in Possession upon a Right from George Steuart, who had Right thereto, (as said is) by a Comprising against Con the common Debitor: Whereunto It was Answered, That the Defenders could not found a Defence upon George Steuart's Comprising, Because the saids Bonds, being the Grounds thereof, were false and improven: To which It was Duplyed, That the Certification against the said Bonds, was only granted against George Steuart; and that the said Andrew Alexander was not called, and that now there is produced the foresaid Bonds; And that the Extracts of the same out of the Register of the Commissariat of Aberdene had been formerly produced; but the Principals, which were in publica custodia, as the warrands of the same, could not be then found by reason of the disorder of that and many other Registers, upon occasion of the late Troubles; and the same being now found ought to be received and sustained as the Grounds of the said Comprising; Seing they are not improven and found false by a Decreet of Improbation upon tryal of the Falshehood; But a Certification is only given against the same for not production; which at the most doth amount only to a presumptive Falshehood, which is now taken away (as said is) by production of the saids Bonds: seing *presumptio cedit veritati*.

It was Answered for the Pursuer, That all Persons, whom he was obliged to take Notice of, and to call to the Improbation of the first Apprying, were called; viz. The said George Steuart, at whose Instance the said Comprising was deduced; and who had also Comprised from Neilson the Right thereof, as said is; and Neilson himself: and that he needed not call the said Alexander, who had only a subaltern Right, and was not infest: and albeit he had comprised from Neilson, yet by that Comprising he had not such an interest as the Pursuer was obliged to know; in so far as, the Right of the Lands in question, was settled in the Person of the said George Steuart, by the Comprising against Neilson: after which Neilson had only a Reversion: and the said Neilson was called himself, as said is: And the said Alexander's Right by his Comprising against Neilson, being only a Right of the Legal of George Steuart's Comprising against Neilson, the Pursuer was not holden to take notice of the said Right: and the said Reversion is not only now expired, but was expired the time of the obtaining of the said Certification, no Order being used thereupon: And albeit the said Andrew Alexander was not called, yet he did compear in the said Improbation; and albeit he pretends, that his right was reserved, the said pretence is of no weight; seing it was reserved only as accords: And Certifications being the great Security of the People, and specially where the same are obtained upon compearance, and after diverse termes are assigned; and after Certification granted, the sament stopt for a long time, upon expectation that the Writes may be got, as in this

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Case;

Case; the samen cannot be canvelled and loosed, *prætextu Instrumentorum noviter repertorum.*

The Lords, For the Reason foresaid, thought hard to loose the said Certification; but specially in this case, seing the said *Alexander* will have and take the advantage of *Stuarts* expired Compyring; and exclude the Doctor who was a true and real Creditor, to whose prejudice the said *George Stuart* and the other Defenders had patched up, not only the said Compyring for small Sums, but other Rights; which the Donator had been forced, after he had Compyried, to question by a Reduction, and had prevailed after a long dependence, and after they had posselt the Lands for a long time: And on the other hand, the said principal Bonds being now produced; they thought it hard, that the Doctor should take advantage of the same, to exclude the Defenders altogether; and therefore they proposed to the Doctor, that he should grant a Reversion to the said *Alexander*, upon payment of what was justly due to him, within the space of two Years: And the Doctor acquiesceing, they decerned in the Removing with the quality foresaid, Lord *Glendoick* Reporter. *Gibson* Clerk. Actor *Chalmers* alteri *Thoirs.* Vide 17. February 1676. inter eosdem.

D. 231.

contra *Maxuel.* 29. January. 1675.

A Bill of Exchange being drawn upon three Merchants, without mentioning that it was drawn upon them, either severally or conjunctly; and one of the persons upon whom it was drawn, being pursued for the whole Sum in the said Bill, being accepted by them all simply, without mentioning that they had accepted the same only for their own Parts; It was Alleged, That they were only lyable for their own Parts, being *correi debendi*; which is understood in Law, that they should not be lyable *in solidum*, unless it were so exprest, especially seing the Pursuer cannot say, that they were either Partners, or that each of them had provision extending to the whole Sum.

The Lords, having thought fit to try the custom of Merchants, and to take the opinion thereupon of certain Merchants in *Edinburgh*; and the Report being positive, that it was the custom of Merchants, both in the place where the Bill was drawn and here, that there should be Action *in solidum* upon such Bills, when they are drawn and accepted simply in manner foresaid; Found the Defenders lyable *in solidum*.

D. 232. *McKintosh* contra *McKenzie.* 29. January. 1675

A Decreet, against a person holden as Confest before the Lords of Session about 20 Years agoe, was questioned as null; upon that pretence, that it did not bear, that the Party, against whom it was given, was personally apprehended; but only that he was lawfully cited.

The Lords Found, That after so long time, the said Decreet could not be declared null and void, upon pretence of an intrinsick Nullity; In regard the said Decreet did bear, that the Defender was lawfully cited to give his Oath; and he could not be thought to be lawfully cited, unless he had been personally apprehended; and *presumitur pro sententia*, and that *omnia* are *solemniter acta*; unless it were made appear by production of the Execution, that the Defender was not personally apprehended:

And



And therefore the said Reason of Nullity was Repelled; Reserving Action of Reduction as Accords. *Monro Clerk.*

D. 233. *Scrimzeor contra Kingheny. 2. February. 1675.*

**M**AJOR *Scrimzeor* having named in his Testament in *Anno 1650.* Sir *John Carnagie*, and the Tutor of *Purie Fodringhame* and *Alexander Wedderburne* of *Kinghenie* to be Tutors to his two Daughters: *Margaret Scrimzeor* one of the said Daughters pursued the said *Alexander Wedderburne* for Compt and Reckoning and Payment; and an Auditor being appointed, and that Question being started before him, *viz.* Whether the Tutor should be Lyable for Negligence, from the time that he accepted; or before, after he knew that he was named Tutor: And upon the Auditors Report, *It was Found* by the Lords, that he should be lyable only from the time of his accepting; and yet the Pursuer having desired and got a Hearing in the Innerhouse, It was again urged for her, that the Tutor should be lyable, after he knew that he was named, and did cease to do that Diligence that was incumbent to him; and diverse Citations were adduced from the Civil Law, and the Titles of the *ff. & Cod. De Tutela & Tutoribus*; And *De Administratione & periculo Tutorum*; which ought to militate in this case, especially in respect the said Defender was not only named Tutor, but was a Legator; a considerable Sum being left to him by the said Testament, which Law presumes was left to him in contemplation of the burden of Tutorie put upon him; so that having accepted the said Legacy, and having confirmed himself Executor Legator, he could not decline the Office, not to be Lyable as Tutor or *ut Protutor*. And it was farther urged, that as Executor Legator, he was lyable to do Diligence: To which *It was Answered*, That the former Interloquitor was opposed being just, and upon Relevant Grounds of Law, in respect the Civil Law is not received by us altogether in the case of Tutors; the Office of Tutorie by the Civil Law being *munus publicum & necessarium*, which no person can decline, unless he have and alledge a just Ground of Excuse, within the time limited by that Law; whereas by our Law and Custom, when any person or persons are named Tutors, they are at liberty to accept the said Office or nor; so that a person named Tutor until he accept, neither is, nor is obliged to do the Duty of a Tutor: And albeit by the Civil Law, a Legacy being left to a Tutor, is presumed to be left *eo intuitu* and upon condition, that he should accept to be Tutor, yet by the Civil Law, if the person named Tutor do not actually get the said Legacy, *nisi consecutus sit*, which are the words of the said Law, he is not obliged to accept the said Office; and it is not, nor can it be said, that the Defender got the said Legacy before he did accept: And as to that other Ground, that the Defender being Executor Legator was obliged to do Diligence; *It was Answered*, That by late Decisions, an Executor Creditor is only lyable to intromet, in order to his own satisfaction; and an Executor *qua* Legator is in the same case as an Executor Creditor; seing a Legacy is a Debt payable out of the Executry; and the Legator has no interest to confirm, but to the effect he may be payed of the same.

*The Lords Found*, That a Tutor is lyable only from the time that he did accept: and that the leaving to him, and his accepting of a Legacy did not alter

alter the Case; unless before his accepting of the said Office, he not only had owned, but got the said Legacy: And this Pursuit being only *actio Tutelæ*, and for Compt and Reckoning against the Defender as Tutor, they did not determine the said Question, How far an Executor Legator should be lyable? but reserved the same, until the Defender should be pursued as Executor.

*The Lords*, in the Debate amongst themselves, some of them did urge these Arguments; That a Tutor being lyable only *ratione Officii*, he cannot be lyable before he accept the said Office; it being inconsistent with Law, that he should be lyable to the Duty of an Office before he have it, which would be *Filius ante Patrem*. 2. In Law, a Tutorie is *quasi Contractus*; and as in all Contracts, it is required that there should be the mutual Deeds of both Parties contracters; and the Nomination (which is the Deed of the Defunct) did not bind the Tutor, until he bind himself by accepting, which is his own Deed. 3. That a Tutor, having a Legacy, should be obliged to accept it, is only provided by the Civil Law; which is the Municipal Law of the *Romans*; and is not of force with us, until it become our Law, either by a Statute, or Custom authorizing the same; and even by the Civil Law, *presumitur* only that the Legacie left to the Tutor is upon the account foresaid, but that Presumption is only in the case, where it cannot be thought, that the Defunct would have left the Legacie upon another account, *viz.* of Relation or any other Consideration; Whereas, in this case, it cannot be thought, that the said Legacy was left to the Defender, upon the account that he was Tutor, in respect he being the last named of the three Tutors, there were no Legacy left to them; and he was Nephew to the Defunct, who had a great kindness for him: and the said Legacy was not left to him simply, but in cate his Wife, whom he thought to be with Child, should not be brought to bed of a Son. 4. The Defender could not accept the said Office of Tutor Testamentar, Because he and the other two Tutors were named conjunctly, and the other two living, he could not be Tutor alone. Actor *Dalrymple*, alteri *Falconer*. Monro Clerk.

D. 234.

3. February 1675.

**A** Removing being pursued from some Lands of the Estate of *Collarnie*; the Lady *Collarnie* compeared, and alledged, that the Tennent could not be removed without her consent, seing she had right to a Terce by the Law, and was not excluded by her Contract of Marriage, tho she was provided thereby to a Jointure, but not in satisfaction of her Terce, or what else she could pretend: Whereunto *It was Answered*, That she was not served nor kened to a Terce; and until then, she had no interest to compear to stop the Removing.

*The Lords* Repelled the Defence, and Found she had no Interest: Reserving her Right of Terce, when she should be served and kened, as accords. *Craigie* Reporter.

D. 235. *Oliphant of Provostmains* contra

*eod. die.*

**A** Bill was given in, desiring, that a Comprising being deduced, and the Messenger having deceased in the *interim*, before he subscribed

ed the same; Therefore an other Messenger who was his Colleague might be allowed and Warranted to subscribe the said Comprising.

*The Lords* considered, That the Messenger that was on life, tho he had been employed to execute the Letters of the Comprising, by denouncing and citeing, yet he did not sit and was Colleague to the deceased Messenger and was Judge with him, the day and time of the deduceing of the said Comprising: and that a Comprising being *Processus Executivus*, consisting of the Executions, and of the Process and Sentence of Comprising, upon the day that the Debtor was cited thereto; tho diverse Messengers may act severally as to Citation and Denunciation, yet none of them could be looked upon as the Judge and the Pronouncer of the Sentence, who ought to subscribe the same, but the Messenger that did actually sit as Judge, and upon the verdict of the Inquest, did Decern and Adjudge.

D. 236. *Cranston contra Mr. Mark Ker of Moriston.*

4. February, 1675.

**U**Pon a Bill, it was desired, that Witnesses should be examined in relation to a Process, that their Depositions should lye *in retentis*: But *The Lords Found*, That tho Summons were raised, that the same not being execute, there was not a Dependence: and that it was a freatch great enough, to receive Witnesses before Litiscontestation in a depending Process, which the Lords are sometimes in use to do: but that Witnesses should be received upon a Bill, without the Foundation of a Process, it is inconsistent with Form.

It is to be Regrated, That of late, the time of the *English*, that Abuse having crept in, that there are so many Bills given in, and sometimes past through inadvertencie in a hurrie; the said custom should be yet retained; so that Bills do juttle out Process and the hearing of Causes; Especially it being considered, that they are oft times offered in the very time, when after pleading in other Causes, Parties and Advocates are removing; which is the Occasion that oft times most of the Lords are not advertent when the same are offered: And it is a Practice not futeable to the gravity of the Court, and not without a dangerous Consequence; feing Bills may be anent Matters of great importance, which ought to be offered to the Lords in a decent way, and should be considered by them deliberately.

D. 237.

contra

*cod. die.*

**T**HE Ship called the *Wine-Grape*, mentioned in the Case above related *Num. 207*; Being Found by a Decreet of the Admiral not to be a Prize: and thereafter the said Decreet being reduced upon a contentious Debate *in foro*: A Bill of Suspension was given in, making mention, that the Lords having thought fit, during the dependence, the Value of the Ship being liquidate, the Price thereof should be sequestrate in the Complainers hands, upon a Bond to pay the Sum therein contained to the Caper and his Owners, if they should prevail in the Reduction foresaid: And that he was charged to pay the said Sum, the Process being now at a period by the said Decreet Reductive, at the instance of an

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Assigney: And that he could not pay the same until an Arrestment made in his Hands, at the instance of the *Smedes* the former Owners of the said Ship, should be purged; which Arrestment was upon the Dependence of a Reduction, intented at the Strangers instance, for reducing of the said Decreet Reductive: It was debated upon the Bill, and amongst the Lords, that the said Decreet being *in foro contradictorio*, was of that nature, that it could not be reduced: and it were of a dangerous Consequence, that after Decreets *in foro*, the People should not be secure, but upon pretence of the dependance of Reductions of the same, that which was found to belong to them by such Decreets, should be again lyable to Arrestment and to questioning: And upon the other hand, It was considered and alledged, That there being Arrestment and Warrant for the same upon the dependance, the Debtor was not concerned to dispute what the Issue of the same may be, but there being *de facto* an Arrestment, the same ought to be purged; which could not be in forme, but either by lousing the Arrestment, or by refusing the Bill upon the reason of Arrestment; the Defender in this Reduction finding Caution to make forthcoming, if the Pursuer should prevail.

The Lords, notwithstanding Found, That in respect the matter was already decided by a Decreet *in foro*, that the Bill should be refused, notwithstanding of the said Arrestment upon the dependance foresaid; which was hard as to the Debtor, who could not be formally secured, but in manner foresaid: And likewise hard as to the Strangers, seing by the said Deliverance, the Lords did in effect predetermine the Reduction now depending; and upon the matter did Find, That the Pursuer could not have Interest to pursue, before the Pursuer was heard in the said Reduction.

D. 238. *Vanse* Jaylor of the Tolbooth of *Edinburgh*,  
5. February 1675.

**M**R. *Vanse* Jaylor of the Tolbooth of *Edinburgh*, did give in a Bill, complaining that the Jaylor of the *Canongate* was in use to enlarge Prisoners being put in for debt, upon the Warrant and consent of the Creditor at whose instance they were imprisoned; whereas the Complainer did not enlarge any such Prisoners, without Warrant of the Lords Letters: and therefore desired, that either he should be allowed to have the same liberty, or that it should be denyed to other Jaylor.

The Lords did consider what was fit to be done in all such like Cases; and in end, the plurality did resolve, that where the Sums were small, not exceeding 200. *merks*, the Jaylor might enlarge Prisoners for debt, without any other Warrant but the consent of the Parties, at whose instance they were imprisoned; which they did upon that consideration, that Poor People, if they should be forced to suspend and relax, with a Warrant to put them out, would be sometime put to more Charges, than the Debt doth amount to. Five of the Lords did dissent, being of the Opinion, That the Prison being His Majesties Prison, no person could be put in upon Letters of Caption, unless the same were under the Signet; and no person put in by Warrant of the said Letters, could be enlarged without Letters to that effect; *nam unumquodque dissolvitur, eo modo quo contrahitur*: And the Prisoner being put in for his Rebellion, could not  
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be enlarged, unless he were relaxed: And if Parties did suffer themselves to be taken and incarcerated for small Sums, it was their own fault, and more unexcusable the less the Sum be; and *majus & minus non variant speciem*: And it being acknowledged by the Law, they being Prisoners for greater Sums, they could not be enlarged, without a Warrant to put them to liberty; and the Law making no distinction of greater and less Sums, the Lords had not a Legislative Power to alter or qualify the same, without an Act of Parliament.

D. 239. *Burnet contra Lutgrue. eod. die.*

A Commission being directed for taking the Oath of a Stranger residing in *Holland*; the Report was questioned upon that pretence, that the Strangers Deposition was not subscribed, albeit the Commission did bear, that he should subscribe the same: and yet it was sustained, because of the Custom of *Holland*, that the Judges only subscribe, and the same was subscribed by them; And it was adminiculate with a Letter from him, bearing, that he had declared before the Commissioners, and that he would adhere to what he had declared. *Gibson Clerk.*

D. 240. *Marion Binnie contra Gilbert Scot, eod. die.*

THE deceast *William Scot* of *Bonington* having three Sons, *William* the eldest, and *Robert*, and *Gilbert*: The said *William* by his Contract of Marriage, had the Lands and Estate of *Bonington* disposed to him by his Father Mr. *James Scot*; but was not infest therein: and after his decease his Brother *Robert* having succeeded to him, did renew a Bond granted by the said *William*, in favours of *Robert Riddel*; and having retired the said *William's* Bond, did grant a new Bond for the Sum therein contained: And the said *Robert* having also deceased, before he was infest in the Estate, or served Heir to the said *William*; and the said *Gilbert* the third Son having succeeded: a Pursute was intended, at the instance of the Relict and Executrix of the Creditor, against the said *Gilbert*, as representing the said *William* and *Robert* his Brothers; at least to hear and see it found and declared, that the said Bond granted by *Robert*, was granted by him in contemplation and lieu of the said *William's* Debt and Bond; and that it ought to affect any Estate that did belong to the said *William*; and in special the benefite of the said Contract of Marriage, and disposition therein made in favours of the said *William*.

*It was Alledged* for the Defender, That he did not Represent *Robert* nor *William*, upon any Passive Titles; and tho he should represent *William*, neither he nor the Estate would be Lyable to the said Debt, In respect the samen was extinct, and innovate by a new Bond granted by the said *Robert*; whom neither he did nor would Represent: And the said Bond being granted only by *Robert*, could not affect any thing belonging to *William*; and he was not concerned to debate upon what account the said Bond was given by *Robert*.

The Lords did encline to sustain the Declarator, upon that head, that the said Innovation was only to the effect, the Creditor might be the better secured and satisfied; the said *Robert* being Appearand Heir for the time;

time; and who if he had lived would have perished his Right, and obtained himself served Heir to *William*; but being prevented by Death, so that the said Bond was altogether ineffectual, the Pursuer had *condictionem causa data causa non secuta*, to be Reponed against the said Innovation: and the Defender was *in dolo pessimo* to question the same, seeing *nemo debet locupletari cum aliena jactura*; And he ought not to have *William's* Estate without payment of his Debt: And some of the Lords did urge and instance the case aftermentioned, *viz.* If the Younger of two Brothers, the Elder having gone Abroad, and thought to be dead, should obtain himself served as Heir to his Father; and the Creditors of the Father conceiving that he had Right should renew their Bonds, and give back these that they had from the Father, and thereafter the Elder Brother should return and should be served Heir to his Father, whether in that case the Creditors might have Action against the Elder Brother and Estate, notwithstanding of the said Innovation?

But because the case was New, and not without Difficulty, *The Lords* before Answer thought fit to try, what way it could be made appear that the said Bond was in lieu of a Bond granted by *William*. *Newbyth* Reporter. *Gibson* Clerk.

D. 241. *Broun contra Ogilvie. eod. die.*

A Person being pursued for an Annuity of Money, did claim the benefit of Retention conform to the late Act of Parliament: But the *Lords Found*, that albeit Retention was granted for relief of Debtors of their Taxation, and that the Debitor was alike concerned as to the end foresaid, whether he payed the Annualrent as the *usura* and profite of a principal Sum, or as Annuity due upon a personal Bond; yet the Act of Parliament, mentioned only Annualrents: And being, as all Acts of Parliament, *stricti Juris*, specially such as are *correctoria Juris communis*; it could not be extended beyond the Letter of the Law. *Nervoj* Reporter. *Gibson* Clerk.

D. 242. *Collonel Fulertoun contra The Laird of Boyne. eod. die.*

THE deceast Laird of *Towie* having named his Relict now Lady *Boyne* Tutrix to his Daughter; and in case of her Marriage *Collonel Fulertoun*: The said *Collonel* pursued the Laird of *Boyne* for delivery of the said Pupil: *It was Alledged*, That her Mother and her Husband would entertain the Pupil *gratis*. *It was Answered*, That *Boyne* being her Step Father, and having no other Relation, but that of *Vitricus*, which in Law is not favoured; his offer to entertain is not Relevant against the Tutor, who has the Trust both of the Pupils person and Estate: And it is to be presumed, that the offer of the Step-Father is upon a design upon the Pupil her Person and Fortune; and that the case had been determined *in terminis* 4. July 1649. *Langshaw contra Mure*.

The Lords Repelled the Defence, and Ordained the Pupil to be delivered to the Tutor. *Strathurd* Reporter. *Gibson* Clerk.

D. 243.



D. 243.

contra

*eod. die.*

**T**HE Lords Found, That a Warrant could not be given to cite at the Mercat cross with certification *pro confesso*; seeing no person could be holden as confest who is not personally apprehended. Mr. Thomas Hay Clerk.

D. 244. Duke of Monmouth contra Earl of Tweeddale. *eod. die.*

**T**Here being a Transaction betwixt the Duke and Dutcheſs of Monmouth, and the Earl of Tweeddale, whereupon a Discharge was granted by the said Duke and Dutcheſs to the said Earl, with content of their Curators, which was also superscribed by his Majesty taking burden for the Duke and Dutcheſs; with an obligation, that they should ratify after Majority: The said Duke and his Lady pursued a Reduction of the said Discharge, upon a reason of Minority and Lesion; *It was Alledged*, That all Parties having Interest were not called, *viz.* The Officers of State for His Majesties Interest; seeing His Majesty was so much concerned, that if any thing were evicted from the Defender, His Majesty would be Liable for the same.

The Lords Repelled the Defence: Without prejudice to His Majesties Advocat to appear for his interest, if he thought fit. Stathurd Reporter. Gibson Clerk.

D. 245. Irving contra Caruther. 6. February 1675.

**T**HE Summonds being referred to the Defenders Oath, who having declared that as to what was referred to his Oath he could not remember nor be positive; It was debated amongst the Lords, whether the Oath did prove or not: Or if the Defender should be holden as Confest, In respect he was to declare *de facto proprio & recenti*; and in such a case the pretence of *non memini* is neither excusable nor relevant: And so it was Found by the Lords, tho some were of the Opinion, that a person comparing and declaring upon Oath, that to his knowledge he did not remember, could not holden as confest, seeing he cannot be said to be contumacious; and to want Memory is not a fault: And after a party has declared, it is only to be considered, whether the Oath proves or not. Mr. John Hay Clerk.

D. 246. Burnet contra McClellane. *eod. die.*

**A** Father being pursued, as Behaving himself as Heir to his Son, and Litiscontestation being made, and Witnesses adduced; the time of the Adviseing, *It was Alledged*, That the Father could not represent his Son as behaving, because the Defunct had a Brother who was produced, and at the Barr: Where to *It was Answered*, That *in hoc statu* the Defence was not receivable; and it could not be said to be *noviter veniens*, seeing the Father could not be ignorant that he had another Son.

The Lords, in respect of the State of the Process, would not receive the Defence, tho verified *instanter*, unless the Son would *suscipere judicium*, and be content that the Process should proceed as against him: which

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appears to be hard ; seing that which was to be proven, was not only that the Defender intromitted, but that he was appearand Heir ; and *in casu notorio*, no probation was to be respected to the contrary : and tho the Father could not but know that he had a Son, yet he might be ignorant that his Son would be preferred to himself, as to the Succession of his own Son: and *in damno vitando, ignorantia Juris* is excusable. Mr. J. Hay Clerk.

D. 247.

contra Captain *Martine* and others.

9. February. 1675.

**A** Ship being taken by a Caper, and being found by a Decreet of the Admiral to be a Prize: Thereafter, upon a Decreet of the Lords, reductive of that of the Admiral, being found to be a free Ship, the Stranger did urge payment against the Captain and the Owners of the value ; And *It was Alleged*, That the Decreet of the Lords, Ordaining Restitution, was against them as *correi debendi*, and not *in solidum*, and that they are only lyable for their own parts: Whereunto *It was Answered*, That though it was found, That the Captain had probable Reasons for bringing up the said Ship, yet upon the matter, the Stranger was wronged by the taking of his Ship ; and *in casu delicti*, by spuilzie or wrongous intromission, or otherways, Decreets against the Persons therein contained are construed to be *in solidum*: and the Stranger cannot know, what the respective Interests and Parts of the Owners are ; and ought not *distrabhi*, and to be put to Process against every one of them, for declaring of their Parts.

*The Lords Found*, That they were lyable *in solidum*; Reserving their Debate and Relief amongst themselves, as to their several Interests and Proportions. Lord Forret Reporter. Gibson Clerk.

D. 248.

*Burd contra Reid. eod. die.*

**T**HE Lords having formerly *Found*, That the Cedents of Personal Bonds, are lyable only to warrand *debitorem esse*, but not *esse locupletem*; *It was pretended*, That there being a Question concerning Warrandice of a Right of Annualrent out of Land, the same should be warranded no other way: But *The Lords Found*, That the Warrandice of Lands, or of such real Rights, upon or out of Land, are absolute, unless they be expressly limited and qualified by their Right. Hamilton Clerk.

D. 249. *Vetch contra the Creditors of James Ker and Peter Pallat. eod. die.*

**S**IR Robert Stewart in Ireland and his Son, being Debtors by Bond in the Sum of 800. *lib. starl.* to the deceast *James Sanderson*; which Bond being conceived in the Form of *English Bonds*, did not bear Annualrent: The said *James* did assign the said Bond in Favours of *Ronald Graham* in trust, and to his own behoof, upon a Back-bond ; and thereafter did assign the said Back-bond in favours of *James Ker* and *Robert Broun* Merchants ; as to two Parts to the said *Ker*, and the third part to *Broun*.

Sir George Maxwel of Pollock being Trustee, and acting in name of the said

faid *Stewarts*, did grant a Bond to the faid *Ker* and *Broun*, making mention of the faid Bond granted by the *Stewarts*, and of the Assignment made by the faid *James Sanderson* to the faid *Broun* and *Ker*; and that after Compt and Reckoning, there was only resting of the faid Sum 300. lib. sterl. which the faid *Sir George*, in name of the faid *Stewarts*, is obliged to pay within three Moneths after that *Stewarts* Bond should be delivered to him, with an Assignment or Discharge.

The faid *James Ker* being deceased, his Executors did intent Action against the faid *Sir George Maxuel*, for his part of the faid Sum, viz. 200. lib.

In this Procefs, *William Vetch* did compear for his Interest, and did alledge, that the Sum in question due by *Sir George Maxuel*, did belong to him, having fallen under the Rebellion of the faid *James Sanderson*, and the Gift of his Escheat, first Gifted to *David Rodger*, fra whom the faid *William* had right, and thereafter to the faid *William* himself: and tho the faid Bond, granted by *Sir George Maxuel*, was granted to the faid *Ker* and *Broun*, yet it was granted for the same Sums, that were due by the faid *Stewarts* to the faid *Sanderson*, as appears by the Bond granted by the faid *Sir George Maxuel*; so that the foresaid Sum due to *Sanderson*, and the Bond for the same, having (as said is) fallen and belonged to the King, it does still belong to him and his Donator; Notwithstanding the faid new Bond granted by *Sir George Maxuel* in place of the same, being *Surrogatum sapit naturam, &c.* It was Answered, That the faid *Sanderson* being Debitor to *Ker* and *Broun*; as he might have payed his Debt after the Rebellion, or the Creditors might have gotten satisfaction by poinding or Arrestment before the Rebels Escheat, so he might have assigned the Debt due to him for their satisfaction. Whereunto It was Answered, for the faid *William Vetch*, That the Rebel cannot make assignment *stante rebellione*, the Act of Parliament in anno 1592. K. Jam. 6. Parl. 12. cap. 145. Entituled, *Anent the Escheats of Rebels*, Bearing expressely, That no Assignment shall be valid being made by a Rebel at the Horn, in defraud of the Creditor; if he be at the Horn for the same cause: And therefore the faid Assignment made by *Sanderson* when he was at the Horn, in prejudice of *Rodger*, *Vetch* his Cedent, at whose instance he was at the Horn for the same Debt, is void: and what may be in the Case of actual payment, or of Poinding, or legal Diligence, needs not be debated in this case; seing the Rebel did neither make payment, nor was the faid Debt due by the *Stewarts*, affected with Legal Diligence, but a voluntar Assignment was made by the Rebel, which being Null, for the Reason foresaid, and the Pursuers Right to the Sum in question, being founded upon the same, the Pursuer can have no Right to the foresaid Sum; and the faid *Vetch* having undoubted Right (as said is) ought to be preferred.

The Lords by their Interloquitor 10 December last, did find that an Assignment made by a Rebel to his Creditor, albeit for a Debt preceeding the Rebellion, and that the Assignment was granted before the Gift of the Rebels Escheat, cannot prejudice the King or his Donator: But that payment made by the Rebel, or any other in his name, upon his Precept or Assignment, being before the Donators Gift, is sufficient to liberate the Creditor from Repetition.



*It was further Alledged* for the Pursuer, that the said Bond granted and due by the *Stuarts* was extinct and innovat; In sua far as the said *Sir George Maxuel* had granted the said other Bond to the said *Ker* and *Broun* for the same Sum, which was equivalent to payment.

Whereunto *It was Answered*, That the said Bond granted by *Sir George Maxuel* was in effect but a Bond of Corroboration, whereby the said *Sir George* became *expromissor*, and upon the matter Surety for the said Sum; So that the former Bond was not innovat nor extinct, being neither Discharged nor Retired; but being only to be Discharged or Assigned upon payment made by *Sir George*, which implyes that it could not be innovat nor extinct, seing it could not be Assigned if it had been extinct.

The Lords before Answer to that Point, *viz.* If the said Transaction was equivalent to Payment, declared they would take *Sir George Maxuel's* Oath *ex officio*, at what time the said Bond granted by the *Stuarts* were delivered up to him, and by whom; and if any Discharges were granted to him of the said Bond.

*Sir George Maxuel* having declared upon Oath, That he had recovered the said Bond from *Ronald Grahame*, and that he had not taken a Discharge of the said Bond either from him or from the said *Ker* and *Broun*.

This Day the Debate was again resumed at the Barr, and amongst the Lords; and these Arguments were urged by His Majesties Advocat. *viz.* That by the Rebellion *Jus quaritur Domino Regi*, and that confiscation *ex delicto* is upon the matter a Legal Assignment, and equivalent to an Assignment intimate: And if there were two Assignations, and the Debtor being out of the Country, the first Assignment had been intimate at the Mercat Cross, and Pear and Shoar of *Leith*, and the Debtor having returned, the second Assigney had intimate his by way of Instrument, and thereupon the Debtor had *bona fide* made payment to him, the first Assigney notwithstanding would be preferable: And tho the Debtor would be free in respect of Payment *bona fide*, yet the first Assigney might repeat the Debt from the second as *indebite* payed to him who had no Right; so that the King and his Donator having Right to *Stuarts* Debt, tho the Sum in question had been payed to *Ker* and *Broun* (as it is not) *a paritate rationis* the Donator might repeat the same as *indebite* payed to them; seing by the said Interloquitor, It is Found, That an Assignment made by a Rebel, albeit before the Gift, cannot prejudice the King or his Donator, for the reason foresaid; It follows necessarily, that the Assigney by vertue of such an Assignment has no Right to the Sum Assigned, and consequently, if the Debtor pay the said Sum *bona fide*, tho he may be liberate, yet the said payment cannot prejudice the King, or his Donator, but they may repeat the Sum belonging to them: And if it be not payed, but a Bond is renewed for the same, as in this case, the Donator ought to be preferred.

The Assignment being null, as said is, There can be no Innovation or Deed done by the Assigney who has no Right, in prejudice of the King or his Donator; seing a Debt cannot be innovat but by a person having Right to the same.

The Law does so far favour Legal Diligence done by the Creditors of Rebels, that there are some Decisions in their favours preferring their Diligence

ligence done before the Gift be declared ; but voluntar Deeds done by Rebels in prejudice of His Majesty, who has *Jus quasitum*, and of the Creditor who has denounced ,are altogether reprobare ; And the Law being clear, and there being no Decision to the contrary in favours of Creditors in the case of payment upon such Assignations as are void in Law; the Donator ought to be preferred ; Otherways a Door should be open to prejudice His Majesty of His Casualty, and Creditors of their Diligence, seing the Rebel may assign, and upon such voluntary Assignations payment may be made : And there should need no Application to the Exchequer for Gifts of Escheats, if they may be so easily evacuate by such practices:

It appears by Sir George Maxuel's Oath, and by his Bond, that the said Debt was not extinct ; seing Sir George did act in the Affair as a Trustee and doer for the *Stuarts* ; and their Bonds were neither Discharged, nor given back by the Assignays, who had Right to the same ; but were recovered by the said Sir George by his own means from Ronald Grahame.

The Lords did adhere to their former Interloquitor, and did Find that Creditors getting payment from Rebels, either by pointing or by Assignment before Declarator at the Donators instance, doth secure the Creditor against the Donator ; And did also Find, that in this case the first Bonds were extinct ; and that the same being delivered to Sir George Maxuel, before Declarator at the instance of the second Donator, that the Assignay is preferable. Sir David Falconer for Veatch alteri Dalrymple, Chartris, &c. Gibson Clerk.

This Decision appears to be hard, seing *Declaratoria non tribuit Jus*, but *Declarat Jus quod est* : And the Horning being declared upon the first Gift, there needed not a Declarator upon the second. *Vide infra* 12. February, and 10. Novem. 1675. *inter eosdem*.

D. 250. Douglass contra Jackson and Grahame.

11. February. 1675.

THE Lords Found, that a pointing is not lawful, unless it be begun before the setting of the Sun; and what is to be done at that time, be all done and compleat before the Day light be gone.

D. 251. Lady Torwoodhead contra The Tennents. *eod. die*.

THE Lady Torwoodhead having gotten Aliment modified to her by the Lords of Council of 600 Merks yearly ; and for surety of the same having gotten the Gift of her Husbands Liferent Escheat, did pursue the Tennents for Mails and Duties.

It was Alledged for Florence Garner. That he had Right to the Lands Lybelled, and Mails and Duties of the same by Compyrings and Infestments thereupon expired.

It was Answered, That the Mails and Duties of the Lands exceed the Annualrents of the Sums contained in the Compyring ; and by the Act of Parliament 1661. for ordering the payment of Debts betwixt Creditor and Debtor, where the Lands Compyrified exceed the Annualrents of the Sums contained in the Compyring ; The Compyrsers are restricted to the possession of such of the Lands dureing the Legal as the Lords of Session should think just : And that the expiring of the said Florence his

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Compyryngs was interrupted by an Order used by *Edward Ruthven* Son to the Lord *Forrester*.

*It was Answered* for *Gairner*, That the Lord *Forrester* had no Right to the Reversion of *Torwoodhead's* Lands; so that no Order used by him, as to these Lands, could be valid to interrupt the said Compyryng: And the said Order neither was nor could be declared.

The Lords, In respect the Lord *Forrester* being principal and his Brother *Torwoodhead* Cautioner, both their Lands were Compyrysed for the same Debt, and that the Principal may satisfy the Debt, and extinguish the Compyryng as to both his own and the Cautioners Lands, They *Found* that the said Order did interrupt the Compyryng as to both.

This appears to be hard. 1. Because the said Act of Parliament indulges the favour foresaid to the Debtors themselves, upon the Conditions therein mentioned, viz. That they should ratify the Compyryers possession and deliver the Evidents; and the same cannot be extended to Donators. 2. A Compyryng cannot be interrupted, but either by Payment and actual satisfaction, or by using and declaring an Order of Redemption: Until which be done, the Compyryng cannot be thought to be unexpired. *Craigie* Reporter.

D. 252. *Kinnier* contra 12. February. 1675.

THE Lords upon a Bill given in by *Kinnier* who had obtained a *Bonorum*, and a Testificat of diverse persons of Credit that he had become insolvent upon occasion of loss and ill Debtors, and was otherways vertuous; They dispenced with that part of the Decreet anent the wearing of the Habit.

D. 253. *Presbytrie of Duns. eod. die.*

THE *Presbytrie of Duns* having by Bill desired, That Letters of Horning may be direct against certain persons who had been cited as Witnesses; and did not appear before them.

The Lords did demurr, In respect Letters of Horning ought not to be direct, but either by consent of Parties, or by Warrant of Acts of Parliament; As appears by Acts of Parliament, ordaining Horning to be direct upon Sheriffs and Commissars Decrees, and Decrees within Burgh, and Admirals Decrees.

D. 254. *Cruickshanks* contra *Watt. eod. die.*

THE Lords Found, That a Disposition being made after Inhibition, but before the Registration of the same, may be reduced *ex capite Inhibitionis*; seing the Execution of the Inhibition doth put the Leidges in *mala fide*: And after the same is compleat, and thereby the Debitor and the Leidges are inhibited to give and take Rights, the Inhibition *ipso momento* thereafter, is valide and perfect; but *resolvitur sub conditione*, if it be not Registrat in due time. Mr. *Thomas Hay* Clerk.

D. 255.



D. 255. *Veatch contra The Creditors of James Ker, and Peter Pallat. eod. die.*

**I**N the case abovementioned *Veatch contra The Creditors of James Ker and Peter Pallat*; It was farther *Alledged* for the said *William Veatch*, that he ought to be preferred, because by the Act of Parliament 1621. Assignations or other Rights granted by Bankrupts in favours of any of their Creditors, who had not done Diligence, and in prejudice of a Creditor who had done Diligence by Horning or otherwayes, are void: And the Creditor who is partially preferred and gratified, if he recover payment he is Lyable to Refound: And by the Act of Parliament in Anno. 1592. anent the Escheats of Rebels, Cap. 145. Assignations made *stante Rebellion* in prejudice of the Creditor, at whose instance the Cedent is at the Horn, are Null; and that the said Assignation made by *Sanderson* in favours of *Ker* and *Broun*, was made by him after he was at the Horn at the instance of *David Rodger*, *Veatches* Cedent: And the said Assignation being Null for the Reason foresaid, all that has followed thereupon is void.

*It was Answered*, That the said Act of Parliament is only to be understood, in the Case when any voluntar Payment or Right is made in defraud of the lawful and more timely Diligence of another Creditor, having served Inhibition, or used a Horning, Arrestment, Comprising, or other Lawful Mean to affect the Dyvorts Land or Estate; and that Horning is not such a Diligence as does affect, being only personal Execution against the Debitor; and that the said Debt of *Stuarts* was many years contracted by the Rebel after the said Horning; and that the said *Stewarts* residing in *Ireland*, and their Bond being conceived after the stile of *English* Bonds, did not fall under *Sanderson* the Creditors Escheat.

Whereunto *It was Answered*, That by the said Act of Parliament, Bankrupts, after they are at the Horn, cannot make any voluntar Right or Payment to gratify or prefer other Creditors; so that there is no necessity to debate whether Horning doth affect or not; And yet the truth is, Horning is such a Diligence as doth affect, seing thereby all the Escheatable Goods are affected, and do belong to the King, and to the Creditor at whose instance the Horning is, who is preferable to the King, and has an interest in the said Goods; and that what ever belongs to a Rebel, whether the time of the Rebellion, or at any time how long soever thereafter during the Rebellion, the same accrues to the King, and consequently to the Creditor in the Horning; and that *nomina debitorum* and Debts *non habent situm*, but are personal Interests, and *sequuntur personam Creditoris*; and if they be moveable, do fall under his Escheat, which is a Legal Assignation, as said is.

The Lords enclined to prefer *Veatch*. But because some of the Lords in voting were *non liquet*, the Business was delayed. *Vide supra* 9. Febr. 1675. *inter eosdem*. And *Vide infra* 10. Novemb. 1675.

D. 256.

D. 256. Parishioners of *Banchrie* contra *Their Minister*.  
16. February 1675.

**I**N the Case of the Parishioners of *Banchrie* against their Minister: *The Lords Found*, That the Act of Parliament, 3. *Seff.* of his Majesties 1<sup>st</sup>. *Parl. cap.* 20. Ordaining that ilk Minister should have Grass for one Horse and two Kine, over and above their Gleb, Did import, That Ministers should have the said Grass, or 20. *lib.* conform to the said Act, albeit their Glebs which they had formerly, did extend to four Aikers, and much more than would be Grass, if the same were left lee to that purpose, for a Horse and two Kine. Some of the Lords were of a contrary Opinion, seing, by the Act of *Parl. K. Jam.* 6. *Parl.* 18. *cap.* Where there is no arable Land, 16. Soums Grass is to be designed for the four Aikers which the Law appoints to be designed for Glebes; and upon the Ground fore-said, Ministers having 16 Soums Grass, may pretend to have also much more Grass designed to them as will keep a Horse and two Kine, or 20. *lib.* *Hattoun Reporter. Hamilton Clerk.*

D. 257. *Binning* contra *Brotherstones*. *eod. die.*

**A**lexander Binning by Contract of Marriage with Margaret Trotter, was obliged to resign a Tenement of Land in Favours of himself and his Wife in Liferent, and the Heirs of the Marriage in Fie; and accordingly Resignation being made, Infestment was taken to him and his Wife, and their Heirs foresaid.

Thereafter the said Margaret having deceased, there being only one Daughter of the said Marriage Margaret Binning; the said Alexander married a second Wife, and did oblige himself to provide the Heirs of that Marriage to 10000 *merks*: And thereafter did induce the said Margaret his Daughter of the first Marriage, after her Minority, to give a Bond, obliging her to resign the abovementioned Tenement to which she was to succeed as Heir of Provision, to her Father, in favours of her self and the Heirs of her own Body, which failzieing, in favours of Alexander Binning her Brother of the second Marriage and his Heirs whatsoever; and to do no Deed to prejudice him anent the Succession.

The said Margaret Binning being thereafter Infeft as Heir of Provision to her said Father in the said Tenement, did by Contract of Marriage with William Brotherstones oblige her self to Resign the said Tenement in favours of her self and the said William, and the Heirs of the Marriage; whilks failzieing his Heirs whatsoever; and upon the said Resignation, she and her Husband were Infeft.

Thereafter the said Alexander Binning her Brother did obtain a Decreet against the said Margaret and her Husband for implement of the said Bond; and for granting a Procuratory of Resignation for resigning of the said Tenement, conform to the said Bond; in favours of the said Margaret her self and the Heirs of her Body, whilks failzieing in favours of the said Alexander: And in obedience to the said Decreet the said Margaret and her Husband did resign the said Tenement: and Infestment was taken to the said Margaret and the Heirs of her Body, whilks failzieing to the said Alexander: After the said Margaret her decease the said Alexander did

did obtain Decreet against the Tennents of the said Tenement for Maills and Duties, which being Suspended by the said *William Brothertanes* and turned in a Lybel; *It was Alledged* for him, that he ought to be preferred being Infeft long before the Pursuer, and 7. years in possession: Whereunto *It was Replyed*, That the Defender was denuded of any Right that he had by the Infeftment foresaid in favours of the said *Margaret* and her Heirs of Provision foresaid; and that the Pursuer had thereby Right as Heir of Provision to her.

To which *It was Duplyed*, That being incarcerat upon the said Decreet against him and his Wife (for Implement) he had resigned for Obedience as Husband, and Authorizing his Wife; but did not intend, nor could not be decerned to denude himself of his own Right, which he had for so Onerous a Cause by his Contract of Marriage.

The *Lords*, having considered the Procuratory of Resignation granted by the Defenders Wife and himself, did *Find* that he had granted the same, not only for Obedience, and for his Interest as Husband, but for his own Interest, and as taking burden for his Wife; and so did denude himself of any Right that he had, in favours of his Wife, and the Pursuer as Heir of Provision: And therefore preferred the said *Alexander*.

Upon the Debate, It was agitate amongst the *Lords*, whether such Clauses in Tailzies, *viz.* That no deeds should be done in prejudice of the Heirs of Tailzie and Provision and their Succession, do import that the Granter of such Obligements should not have power to dispose of the Land that is Tailzied; and have that liberty which is inherent to *Dominium*? Or if it should import only, that they cannot break the Tailzie, or provide the Lands in Tailzie to other Heirs.

The President was of Opinion that the Fiar could not dispoise nor do any other Deed: And that the said Clause was not restricted to the altering or breaking of the Tailzie. But this point was not decided.

D. 258.

*Ratrow contra*

15. February 1675.

**A**N Apperand Heir having, upon an Exhibition pursued by him to the effect he might advise whether he would be Heir, obtained the Writes to be exhibited in the Clerks Hands; did thereafter upon a Bill desire the samen to be delivered, pretending that he had use for the Writes for serving himself Heir; and no other person could have any Interest for keeping them but himself.

The *Lords* granted the desire of the Bill: Albeit some of the *Lords* thought, that the Writes could not be delivered to him, unless he were Heir, but only such as he should have use of for his Service upon a Ticket to the Clerk to redeliver the same, if he should not be served Heir within a certain time: And that the Creditors had Interest, seing the Apperand Heir, if he should resolve not to be Heir, might embazle and put the Writes out of the way, in prejudice of Compylers.

D. 259.

*Hay contra Gray.* 4. June. 1675.

**A** Merchant, having given a Commission to a Skipper to carry a parcel of Salmond to *Bordeaux*, and upon the Sale of the same there, to bring home Wines and Prunes; pursued the said Skipper for the said Sal-

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mond and profite thereof, and referred the Lybel to the Skippers Oath: And the Defender having qualified his Oath in these Terms, *viz.* That being upon his Voyage to *France*, he was forced to go in to *Holland* by Storm of Weather; So that he could not go to *Bourdeaux*; And that he was forced to sell the Salmond in *Holland*, and with the price of the same did buy a parcel of Cards and other Goods mentioned in his Oath, for the Pursuers use; and having embarked the same to be transported to *Scotland*, and in the *interim* War having arisen, the Ship and Goods were taken by the *Dutch*; and that he had done for the Pursuer as for himself, and as other Merchants had done for themselves; Which Oath being advised, It was debated amongst the Lords, whether the Defender should be Affoiled, in respect of the Oath and qualification foreaid? And *It was Found*, that albeit the Defender might be excused upon the account foreaid, for not going to *Bourdeaux* and fulfilling his Commission *in terminis*, yet as to the buying of the parcel of Cards with the product of the Salmond, and the embarqueing of the same for the Pursuers use, for which he had no order; he was to be considered as *negotiorum gestor*, and upon his own hazard; and could not prejudge the Pursuer by disposing of his Money; unless he were able to say, that *gessit utiliter* both *consilio & eventu*; specially seing he might have secured his Money in Factors hands, or transmitted the same by Bills of Exchange, without employing or far less hazarding the same without order. Mr. Thomas Hay Clerk.

D. 260.

8. June 1675.

**T**HE Lords yesterday did Order, that in regard of the great abuse in desiring and granting Advocations so frequently from Interiour Courts, to the great prejudice of the People, and the retarding and delaying Justice; that therefore the Ordinary upon the Bills may refuse to pass Advocations, if he find cause; but that he ought to report all Advocations before they be past to the whole Lords.

D. 261.

Kyle contra Gray. eod. die.

**T**HIS Day the Lords Found, That Advocations for Sums of Money within 200 Merks, could not be past upon any reason of Iniquity. Castlehill Reporter.

Some of the Lords in the case foreaid were of Opinion, that Advocations should not pass, tho the Process had been for a Sum above 200 Merks; Because Litiscontestation had been made in the Cause; and after Litiscontestation there can be no Iniquity but by a Decreet; which ought to be Suspended without Advocation.

D. 262.

Grant contra Grant. 10. June 1675.

**I**N the Improbation of a Bond; the Bond being produced, and the Defender refusing to abide by the same, Certification was craved against the said Bond, because the Defender did not abide by the same: And the Lords were clear, that the Certification should be granted for not abiding by the said Bond, tho it was produced; but because the Witnesses in the Bond had been examined, and there being only two Witnesses to the same,

same, they both declared that they were *impuberes*, the one of 8. and the other of 9. Years of Age, the time of the subscribing of the Bond; and the Subscription was not like the Subscription now used by them; and to their remembrance they were not Witnesses to the same; but were not positive that they were not Witnesses.

*The Lords*, in respect of their Declarations, and that the Defender himself, did in effect, at least presumptively, acknowledge the falsehood of the Bond; in sua far as he did not abide by the same; Had an Impression that the Bond was false; and therefore they granted *Certification* for not abiding by the same: and did leave to the Pursuer, either to take out the Certification, or to insist in improving of the Bond, or for declaring the same Null, as wanting Witnesses, as he should think fit: Seing without question, tho the Witnesses did not fully improve it, yet in respect of their Age the time of their pretended subscribing the same, and by their Declaration, they did not affect the Truth of the same; In which respect, the Bond ought to be constructed, and looked upon as wanting Witnesses, and so Null. *Mr. Thomas Hay Clerk.*

D. 263. *Scot contra Murray.* 11. June. 1675.

A Suspension being raised of a Decreet; Arrestment was used at the instance of the Creditor, after the raising of the same; and upon that pretence, It was craved by the Suspender, That the same might be loosed; and upon the Report of the Bill, the Lords having debated, Whether the said Arrestment could be loosed, being upon a Decreet, though suspended?

*The Lords Found*, That tho a Suspension be raised of a Decreet, yet it does not cease to be a Decreet, until it be taken away by a Decreet in favours of the Suspender; and that tho a Suspension sists execution, yet the Creditor may arrest; seing the Arrestment is no Execution, but a Diligence and Remedy to preserve the Debtors Estate; to the effect that after discussing of the Suspension, the Creditor may have execution against the same: And therefore *They Found* the Arrestment could not be loosed. In this case, the Suspender had consigned the Principal Sum, but not the Annualrents; otherways if he had consigned all, the Lords would have loosed the Arrestment; seing the Consignation of the Money is sufficient Surety to the Creditor. *Mr. Thomas Hay Clerk.*

D. 264. *Auchenleck contra E. Monteith.* 15. June 1675.

Widow *Auchenleck* pursued the Earl of *Monteith*, for the price of certain Ware for his Ladies Cloaths, extending (conform to an Accompt) to the Sum of 177. *lib.* It was Alledged for the Earl, That the said Ware was furnished, after he had served Inhibition against his Lady that she should not contract Debt to his prejudice. Whereunto It was Answered, That the said Furnishing was necessary for the Ladies Cloaths, and albeit after Inhibition, she could not contract Debt to her Husbands prejudice, yet the Earl being obliged to furnish her Cloaths, and other Necessaries; he will be lyable for what is furnished to her necessarily.

*The Lords*, (upon the Report of the Debate foresaid) having considered the Inhibition, and that the execution of the same was not registrate; were

were of the Opinion, that the said Inhibition was Null: But because it was not questioned by the Defender, they Ordained that the Reporter should hear, what Answer the Defenders Procurators could make as to the said Nullity.

It was thought hard by some of the Lords, That a Merchant, after Inhibition at the Husbands Instance, furnishing *bona fide* to the Wife, should be frustrate upon the pretence of an Inhibition; unless either the said Inhibition had been intimate to the Merchant, or it were notourly known that the Wife was Inhibited; seeing such Inhibitions are granted without any Ground either of Write, as Bond or Contract, or the dependance of a Process; but only upon a Bill and Desire of the Husband, *sine causa cognitione*: And it were hard, That Merchants, when Persons and Ladies of any Quality, come to their Shops for buying their Ware, should go to the Registers and try whether they be inhibited. but these Points were not decided.

D. 265. *Katharine McMillan Lady Logy contra Meldrums.*  
16. June 1675.

A Disposition being granted by a Husband to his Wife of Moveables, and she in an Improbation of the same, being urged to abide thereat; and offering to abide at the same as a Write truly delivered to her by her Husband: *The Lords Found*, That she ought to abide at the same *simpliciter*, and tho such a Qualification may be allowed to Strangers and singular Successors, who may be *in bona fide* to take Assignations to Writs; Yet Wives and conjunct Persons and Relations, are in a different condition, seeing they are presumed not to be ignorant of the Deeds and Transactions of their Husbands and Relations. *Newbyth Reporter. Monro Clerk.*

D. 266. *Thomson and Halyburton contra Ogilvie and Watson,*  
*eod. die.*

*David Thomson* having, by his Testament, nominate his Wife Executrix and Tutrix; and having left a Legacy to his Son of 5000. *lib.* and having ordained his Relict to employ the same upon Annualrent, in sua far as he ordained him to be educate upon the Annualrent of the same: In a Pursute for the said Legacy, and the Annualrent of the same, *It was Alledged*, That the Executrix could not be lyable for Annualrent: And *It being Replyed*, That she was also Tutrix, and Tutors are lyable after the first Term that they embrace the Office, for Annualrent of the Pupils Means; and that having confirmed the Testament, by the Nomination foresaid of her to be Tutrix, she hath accepted the Office of Tutorie: And the Point at Interloquitor being, whether by confirming of the Testament, she had accepted of the Office of Tutorie? Some of the Lords *viz.*

Were of the Opinion, That by Confirming of the Testament, she did not accept of the Office: But it was *Found* by the Lords, That having confirmed without Protestation that she did not accept of the Office, *eo ipso* she did accept of the same: And tho she had emitted such a Protestation, it could not be allowed, seeing she was not only  
named



named Executrix, but had a Legacy left her; and she could not accept the Office of Executry and Legacy foresaid, and repudiate the Office of Tutor of her own Child.

*The Lords* (in the Case foresaid) *Thought*, That if the Relict were able to make appear, That having used all possible diligence, she had not recovered Payment of the Defuncts Means; she could not be lyable for Annualrent, but from the time that she recovered the same. *Castlenil Reporter. Monro Clerk,*

D. 267. Gray contra Cockburn. eod. die.

**T**HE Lords Found, In the Case betwixt the Laird of Cockburn and Mr, William Gray Minister at Duns, That Cockburn, being lyable to pay certain Bolls of Victual betwixt Tule and Candlemas, might have payed the same upon Candlemas day: and that as he might have payed the same he might have made offer thereof: but that in all cases of that nature, Persons who are lyable, and do make such Offers, are not thereby liberate as to the greatest Pryces, unless the Partie be *in mora* to receive the Victual; either the time of the offer, or six days thereafter. *Castlenil Reporter. Monro Clerk.*

D. 268. Heckford contra Ker. 17 June 1675.

**M**R. Hugh Ker having granted Bond to Heckfords, for the Sum of 1000. merks; and being obliged thereby to pay the said Sum with Annualrent at *Martimas* thereafter; and for the Creditors surety having wadset by the said Bond ten rudes of Land, to be posselt for the annualrent of the said Sum, so long as the same should remaine unpaid: The Representatives of the said Mr. Hugh were pursued for 6 lib. as the inlake, whereof the Rent of the Land did come short of the Annualrent of the said Sum and for publick burdens: who did alleadge, that the said Right being a proper wadset, and the saids Lands being posselt by the Creditor, the Debitor was not lyable, neither for Annualrent nor Publick Burdens.

*The Lords Found*, That the Bond being of the Nature foresaid, and containing a proper Wadset; so that if the Duties of the Lands had exceeded the Annualrent, the superplus would have belonged to the Creditor entirely; and not been imputed in payment of the Principal; the Debitor was not lyable either for inlake or publick Burdens: And tho in the beginning of the Bond, the Debitor was obliged to pay Annualrent; yet the payment of the same was qualified, and to be understood according to the whole Tract of the Bond, *viz.* That the Duties should be allowed for payment of the Annualrent, and that the Creditor should possess, and have the use and *avantages* of the Land and Rents thereof for his Annualrent; which is clearly a proper Wadset. *Newbuth Reporter. Mr. John Hay Clerk.*

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D. 269.

D. 269. Colledge of *Aberdeen* contra The Town of  
*Aberdeen. eod. die.*

**D**OCTOR *Reid* having by his Testament left his Books to the Colledge of *Aberdeen*, to be kept by a Bibliothecare; and having left for a Patrimony and Sallary to the Bibliothecare the Sum of 6000 *Merks*; and having named Mr. *Robert Dounie* his own Relation to be Bibliothecare; and in case of his refusal, having appointed another to be chosen by the Colledge: And the Master of the Grammer School, Mr. *Robert Paterfon* being presented to the said Office by the Colledge, pursued a Declarator to hear and see it Found and Declared, that he has Right to the said Office and Sallary.

*It was Alledged* for the Town of *Aberdeen*; That no Title was produced for the Pursuer but the Extract of Doctor *Reid's* Testament, bearing the said Mortification; which could not be respected, seing the said Extract is out of the Books of the Commissars of *Aberdeen*; and his Testament could not be confirmed, but by the Commissars of *Edinburgh*, he having died out of the Country; and therefore the said Extract could not be considered, but as a Copy, and the principal ought to be produced; And it appears, that there was never any Principal, bearing the Masters of the Colledge to have the Election of the Bibliothecare; seing the Town of *Aberdeen* has been in use since the Mortification to present to the said Office; and by a Contract in anno 1632. betwixt the said Mr. *Dounie* and the Town, he is presented to the said Office by the Town; to which Doctor *Dun* the Principal of the Colledge was Witness, and the Executors nominate likeways Witnesses.

The Lords Found, There was no necessity to produce the Principal, the Extract being a sufficient Title: and as to the pretended Nullity, it was not *Juris*; seing *non constat*, that Doctor *Reid* died out of the Country: And if there were any Ground upon the pretence foresaid, it were only of a Reduction.

It was Found also, That by the said Testament, the Nomination of the Bibliothecare did belong to the Colledge, and the possession of the Town without a Right cannot Found a Defence *in petitorio*: and the Deed and Contract with *Dounie*, and the Subscription of the Principal, and of the Executors of Doctor *Reid* as Witnesses, could not prejudice the Colledge.

The Lords having considered the Tenor of the Mortification, which gives Power to the Colledge to Name in case of Refusal of *Dounie*; Found nevertheless, that the said Interest to Name and choose a Bibliothecare was not temporary and *prima vice*; Seing Wills of Defuncts were to be interpret benignly, Especially in favours of Colleges; and there can be no reason, why the Defunct should have appointed the said Election to be in manner foresaid for the first time, and not thereafter: And if the Colledge had not the Right foresaid, it should not belong to the Town, but the Defuncts Heir, who doth concur with the pursute. *Newbyth* Reporter *Robert Hamilton* Clerk.

D. 270.

contra

18. June 1675.

**I**N an Adjudication, the Appearand Heir being called, and his Advocates having compeared and desired to see the Process; *It was Alledged*, That he had no Interest, having renounced, and that his compearing was only to retard the Pursuers Diligence, that other Creditors might come in. This point of form being reported, *viz.* Whether his Procurators should see: And if they should see, whether *in communi forma* or not, or in the Clerks hands?

Some of the Lords were of the Opinion, That being a Person necessary to be called, and being called, his Procurators should see *in communi forma*, the Law making no distinction; and tho he had Renounced, yet he had Interest to see and object, whether the Pursuers Debt was the true Debt, or satisfied; and if it appeared that it was satisfied, he may, notwithstanding his Renunciation, enter if he thought fit: And the Renunciation may be questioned as false.

The Lords nevertheless *Found*, That he should see only in the Clerks hands within 24. Hours; tho it was urged, that if the Party were in Town, that course might be taken; but the Party being at the distance of 100 Miles, or any other considerable distance, so that in so short a time the Procurator could not get Information, it were better that in such cases the Processes should be seen *in communi forma*: For if Parties had prejudice, they would apply again by Bills, which would occasion greater trouble and delay. *Redford Reporter.*

D. 271.

E. Weems contra Bruce. 22. June 1675.

**A** Bond being granted by the Earl of Weems to *Bruce* and his Wife *Gaw*, and the longest liver of them two, and to the said *Bruce* his Heirs: and the said *Gaw* the Relict having intended a pursuit for payment of the Sum due thereby, *It was Alledged*, it was prescribed, there being more than 40. Years Elapsed since the granting. *It was Answered*, That the time of the Husbands Lifetime, the Bond did not prescribe against the Pursuer, being cled with a Husband, and so *non valens agere*.

The Lords, upon the Report made by my Lord *Newbyth*, Did *ex tempore Find*, That it did not prescribe during the Husbands time: Tho some of them were of the opinion, that the case was of importance as to the Consequence; and was to be further thought upon and debated, in respect it cannot be said, but there was a Person *valens agere* ever since the date of the Bond; the Husband during all this time being *valens agere*; and after his decease, the Wife: and the Husbands silence, being the Fiar, and the Person who had Right for the time, being joined with the Relict her silence; and both being joyned by the space of 40. years; all the reasons of Prescription concurred in the Case, *viz.* That Debtors should be secured after so long a time; and that there is *presumptio Juris*, the Bonds may be made up, and nothing thereon done till all the witnesses were dead: And that maxim *contra non valentem agere*, &c. is to be understood in the case, where there is not a person having Right *valens agere*, by the space of 40 years: or in the Case of temporary and momentary Prescriptions,  
but



but not in Prescriptions *longissimi temporis*: Otherways, Prescription, being the great Salvo and Security of People, might be eluded, and a person acquiring a Right of Lands, posselt by his Author peaceably, for the space of 40. Years without any Interruption, should not be secure; seing it may be pretended, That the Husband, having been silent fourty Years, without any Interruption; his Wife, who pretends Right to the Lands by Liferent or otherways, *non valebat agere* during the Marriage.

D. 272. *Bruce contra Bruce.* 23. June 1675.

**D**OCTOR *Arnot* having dispoñed, to one of his Nevoys, an Annualrent out of certain Lands belonging to him; and thereafter having dispoñed to another of his Nevoys, the elder Brother of the Annualrenter, the foresaid Lands: A poinding of the Ground was intended, at the Instance of the Person who had Right to the Annualrent: And *It was Alledged*, That the Disposition of the Annualrent was never delivered by the Doctor, but was beside him the time of his decease, and was *viis & modis* gotten out of his Charter Chest, and given to the Pursuer: To which *It was Answered*, That the Pursuer had the Paper in his Hands, and it was presumed to be delivered: And *2do*. Tho it should be supposed, that the said Right was amongst the Doctors Papers the time of his decease, yet the Doctor having made the said Right publick by an Infeftment, and Seasin thereupon to the Pursuer, which was Regiftrat; albeit he might have evacuate the said Right by destroying the Disposition, yet nevertheless having keepest the same by him undestroyed, it ought to be construed in Law, that being Uncle to the Pursuer, and having given the said Right upon the account of the said Relation, he kept the same by him to the Pursuers behoove, unless it could be made appear, that the Doctor did any Deed to recal and evacuate the said Right.

The Lords repelled the Defence of not delivery, in respect of the Answer. *Hutton* Reporter. Mr. *Thomas Hay* Clerk.

D. 273. *Dowglass of Kelhead contra Carlyle and others.*  
*eod. die.*

**K**ELHEAD pursued a Declarator of Non-entry, pretending that he was Superior of the Lands libelled: In which Process, *It was Alledged*, That he was not Superior of the said Lands, In respect the Right libelled, that he had from my Lord *Queensberry*, was to be holden of the Dispoñer: and *Queensberry* being Superior to the Defenders, could not interpose another betwixt him and them: And upon the proponing of the said Alledgance, the Pursuer was forced to reply, upon a Right to the Casualties granted by a Paper apart by my Lord *Queensberry* to the Pursuer, and thereupon Process was sustained: and decreet given for the retoured dutie before the intention of the Declarator; and the full Avail and Rent of the Land after the intention of the Cause. Of which, Suspension being raised upon these Reasons. *1mo*. That, after Decreet of Declarator was recovered, the Superior and his Donator has Right to the Lands during the Non-entry; and may remove Tennents, or uplift the Duties from them; but before Declarator, there could not be a Sentence for Poinding the Ground, for the full avail. *2do*. Tho the Ground could be poinded for the full  
avail,

Avail, yet the Pursuer has no Right but to the Feu-duties, even after the intention of the Cause, before the Pursuer did Found upon and produce the Assignment foresaid, as his Right to the Casualties; seing there being a question whether my Lord *Quensberry* or the Pursuer had Right to the Superiority, and the Libel being only founded upon the Pursuers Right as Superior, the Defender was *in bona fide*, and could not enter nor be lyable for the full avail, until the Question was cleared by production of the said Assignment: and therefore could not be lyable until the same was produced.

*The Lords*, As to the first Reason, *Found*, That after the intention of the Declarator of Non-entry, at the Instance of the Party having Right, the Defenders are lyable in the full avail; and that the real conclusion of poiding the Ground for the same may be sustained; seing the Ground may be poided for a Rent liquidate, as it was in this Case: and when Lands are not retoured, the Pursuer, even before Declarator, may crave Right to the Rents. As to the Second, *The Lords* were all clear, that the Defender was not lyable for the full avail, but after production of the Title, whereupon the Pursure is sustained: But it being moved, that the Defenders having proponed the said Alledgance before the same was repelled, and decret given out for the full avail, after intention of the Cause; some of the Lords were of the Opinion, that there was now no Remedy: Others thought, That there being a clear iniquity and prejudice to the Party, and the Lords being convinced of the same, they ought to do justice to the party: And the question being brought before them upon Suspension *ex incontinenti*, and not *ex intervallo*, the Sentence *non transiit in rem judicatam*: Whereupon some heat having arisen among the Lords, while some did plead the Credit of the House, and the Security of the People, that the Decreets of the Lords *in foro* should be an ultimate and unquestionable Decision; and others Thought and did represent, that the Honour of the House, and Interest and Security of the People consists in this, that Justice should be done, and no evident Iniquity should be, without Remedy; Especially where a Decreet has not taken effect, and become *res judicata*, but is drawn in question immediatly by a Suspension. The Lords did demur, and decided not that Point. *Castlehill Reporter. Gibson Clerk.*

D. 274. *Hamilton of Munkland contra Maxuel.*  
*eod. die.*

UPON the Report of *Redford*, betwixt *Hamilton of Munkland*, and *Maxuel*, *The Lords Found*, That a Debt, due by a Person, who had dispoed his Land upon the account that a Manse was built, and that he was resting his Proportion of the Charges, is not *debitum Fundi*. *Hamilton Clerk.*

D. 275. *The Colledge of Aberdeen contra the Town of Aberdeen.* 24. June 1675.

IN the Case abovementioned, of the Colledge against the Town of *Aberdeen*; *The Lords*, having heard again a Debate *in praesentia*, Did adhere to what they had *Found* formerly: and did Declare *Jus eligendi*

di of a Bibliothecare to pertain to the Colledge. *Vide 17. June 1675. inter eosdem.*

D. 276. Earl of *Lauderdale* contra Lady and Lord *Yester*.  
25. June 1675.

THE Duke of *Lauderdale* having settled upon the Lady *Yester* his Daughter, his Estate: and thereafter by Contract of Marriage betwixt the said Lady and my Lord *Yester*, containing a Procuratory of Resignation, whereupon Infeftment followed; the said Estate is disposed and resigned by her, with consent of her Father, and him for his Interest, in favours of the said Lady, and the Heirs of her Body of that Marriage; and these failzieing; of any other Marriage: With Provisions contained in the said Procuratory; And in special, that the said Lands should be redeemable by the Earl, upon a Rose-noble; and that upon an Order used, the said Right in Favours of the Lady and her forefaids should be void; and two other Provisions in Case of Redemption, *viz. 1mo.* That in Case the Duke of *Lauderdale* should think fit to redeem, that the Duke and his Heirs should be lyable, and obliged to pay, (likeas they bind themselves by the said Provision, to pay) to the Lady and her forefaids, besides the Tocher, 7000. *lib. sterl.* at the first Term after the Dukes decease. And *2do.* That whereas by the said Contract, the Lady, if the Estate had not been redeemed, was obliged to pay all her Fathers Debts and Legacies, she should be free of the same, in case of Redemption: Which Provisions are contained in the Infeftments.

The Duke, having used an Order, and having intended thereupon a Declarator of Redemption; concluding that the Lands should be declared lawfully redeemed, and that his Daughter should be decerned to denude her self; and to grant a Procuratory for Resigning; since she was infeft by publick Infeftment.

*It was Alledged,* That as to that Conclusion, that she should renounce; there was no Warrant for the same; seing there was not a Reversion in these Terms, that she should grant the Lands orderly redeemed and renounce; in which Terms, Reversions, which are *pacta de retrovendendo*, are ordinarily conceived; but that the Reversion, whereupon the Order is used, is only a Provision contained in the said Contract of the Tenor fore-said; with a resolute clause, in case of Redemption, which imports no Obligement upon the Lady, nor *pactum de retrovendendo*, but only *Jus Retractus*, and a Faculty and Power to the Father to Redeem; and in case of Redemption, the expiring and Nullity of the Right.

2. *It was Alledged,* That tho the Lady were to Renounce; her Renunciation ought to be qualified and burdened with the provisions contained in her Right; and in special, with the fore-said provision as to the securing to her 7000. *lib. Sterl.* and the other Provision fore-said for securing her relief of the Debts.

*It was Replied,* That as to the said first Alledgance; that *inest* in all Contracts bearing Reversions; whether in the formal Terms of a Reversion; or Provisions upon the matter importing a Reversion: and *ex stylo* all Decrees of Redemption do contain the said Decerniture to Renounce: And the Duke being denuded in favours of his Daughter by publick Infeftment, the *habilis modus* to return again to his Right upon Redemption, is upon the Resignation.

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As to the 2d. *It was Answered*, That the said Provisions are not in the Reversion; and amount only to a personal obligation upon the Duke and his Heirs; but not to be a real burden and incumbrance upon the Right.

As to Debts, *It was Answered*, That there needs no other security for the Lady her relief of the same; seeing she was to be lyable thereto in contemplation of the Right, if it should stand effectual in her Person: And its provided, in case of Redemption, she should be free thereof.

*It was Duplyed* as to the said provisions; That the same, being in the body of the Procuratory and Infeftment, are real; and they are insert *unico contextu* with the provision, that the Lands shall be redeemable; and doe qualifie the same: And that notwithstanding that it be provided, That in case of Redemption she should not be lyable to the Debts, yet she may be in hazard to be overtaken as *Successor Titulo Lucrativo*; In respect, by the said Right it is provided, that in case of Redemption the said 7000 lib. should be given to her and her foresaids; which being a provision introduced in her favours, and in effect in lieu of the Estate, and being so great, may fix upon her a Passive Title; as having gotten by her Father beside her Tocher so great a Sum; which is not payable to her Husband, but to her and her foresaids; and therefore could not Renounce, but with the burden of the said provision for her Relief.

The Lords Found, That she ought to Renounce: Reserving to her the foresaid provision, as Accords. *Castlehill Reporter. Gibson Clerk.*

D. 277. Tutor to the Laird of Aitons Daughter.  
*eod. die.*

THE Tutor to the Daughter of the deceased Laird of Aytoun, having craved by a Bill, that he might be warranted by an Order of the Lords, to set the Pupils Lands for less Duties than were payed formerly; seeing the former Duty could not be gotten.

The Lords, Tho they had granted the like desire in favours of other persons upon Bills, thought, upon better consideration, that it was fit to refuse the said Bill; seeing upon such pretences Minors may be wronged by their Tutors Authority; and the Lords have only a *Jurisdictio contentiosa* in relation to Processes or questions depending betwixt Parties; but not a voluntar Jurisdiction, or power in relation to Administration of private Estates: And if the Tutors Deed in setting pupils Lands were warrantable, the Law would secure him: And therefore left him to do as he will be answerable. *Redford Reporter.*

D. 278. contra *eod. die.*

UPON a Report made to the Lords, concerning a Decreet of the Commissars which was questioned upon Iniquity, because it being urged, that Caution should be Found in an Improbation, the Commislar did not Order the Party to find Caution.

It was Debated amongst the Lords, Whether Caution should be Found or Money should be consigned, alsowell in Actions as upon Exceptions in Improbations? And some were of the Opinion, that Caution or Consignation should be in all questions of Improbation; Whether  
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by way of Exception or Action, conform to the Act of Parliament, *Q. Mary. 7. Parl. Cap. 62.* And some of the Lords were of the Opinion, that the Law being clear to that purpose, Consignation should be wherever such Questions fall out either by way of Action or Exception: But the contrary was asserted by others, and they pretended Custom; but nothing was instanced to verify the custom; and tho it were, it ought not to derogate to so clear a Law upon so good Grounds.

The Lords did not decide this point at this time.

D. 279.

contra

*ead. die.*

**U**PON a Report made to the Lords concerning an Advocation; upon that reason, that there was a Competition in the case upon double Rights: It was debated among the Lords, Whether the cause being undoubtedly competent before the Inferior Judge, the pretence, that there was a competition of double Rights should be a Relevant Ground of Advocation: And some of the Lords were of Opinion, that in the general to Advocate upon that Reason, it were hard; seeing Inferior Judges their Jurisdiction as to Causes competent before them, is founded upon their Rights; so that they have all good Right to the same as to any other property: And in Removings, and Actions for Maills and Duties, and others such real Actions, when a Defence is founded upon a Right, or when Parties compare for their Interest, and produce Rights, it may always be pretended, that the question is anent double Rights; so that the Jurisdiction of Inferior Judges may be altogether evacuated: And the Lords, who have scarce time to decide Causes that are proper before them, should be cumbered with Processes that may and ought to be determined by an Inferior Judge; contrar to the Acts of Parliament, and in special the *39 Act of Q. Mary her 6th. Parl.* And the *8th. Act of His Majesties 1st. Parl. 3. Sess.* Discharging the Advocation of Causes, whereunto Inferior Judges are expressly appointed Judges: But if it should be represented and appear, that there is intricacie in such Causes, wherein there may be question of double Rights, the Lords in that case may Advocate: But upon the pretence of double Rights, as to which it may be there is no difficulty, there ought to be no Advocation. Yet it was urged by that the Lords were in use to pass Advocations upon the reason foresaid; And albeit the pretence of custome not being verified, and tho verified being against Law, ought not to be put in the ballance with expresse Laws founded upon good Reason and Common Law, yet the Bill was pass. *Redford Reporter.*

D. 280.

*Gilchrist contra Murray. 26. June. 1675.*

**I**N a Process for payment of a Sum due by the Defender, the Lybel being referred to his Oath, and he having declared with a quality, *viz.* That as he was Debitor so he had made payment, partly in Money, and partly in Commodities and Ware.

The Lords, Upon Advising of the Oath, Found, That the same not being special as to the quality of Payment, *viz.* How much was payed in Money, and how much in Goods, nor being special, as to the quantity,

tity of the several Goods; did not admit the same: but if it were made special, as to Money payed by him, it would be sustained *pro tanto*: And as to the delivery of Goods in satisfaction of the Debt; It resolved in an Exception, and ought to be proven. *Hamilton Clerk.*

D. 281. *Livingston contra Garner. eod. die.*

A Bond being granted for payment of a Sum, and thereupon the Grantor having suspended in his own time; and a Decreet of Suspension being recovered in his favours: after his death, his Son being of the same Name, was Charged, Denounced, and taken with Caption for the same Debt.

The Lords upon a Bill, Did Find, That the Son ought to be free of the said Debt: and in regard of the Chargers trincating and fraudulent Practice, they modified 40. *lib.* to be payed by him, the one half to the Partie, the other half to the Poors Box. *Gibson Clerk.*

D. 282. *Langlands Supplicant. eod. die.*

A Bankrupt having obtained a *Bonorum*, by a Bill desired the Lords to dispense with his wearing the Habit, in respect of an Attestation of two Persons, that he had become irresponsal, upon the account of Cautionie, and other Occasions mentioned therein; which the Lords did: Albeit some of their Number were of another Opinion, and did urge, that by the Act of Parliament, such Persons being infamous, and the Lords by an Act of *Sederunt*, having Ordained that they should wear the Habit, as is the Custom in all other Nations, that they may be known to be such Persons; the Lords neither could nor ought to dispence with expresse Laws and Statutes; and that no respect ought to be had to the Attestation, being emitted by privat Persons having no Authority, and not cited nor sworn to that purpose: and the pretence contained in the Attestation was most irrelevant. *Gibson Clerk.*

D. 283. *Birnie contra Montgomerie. 29. June 1675.*

A Pursute for making up the Tenor of a Comprising was sustained, in respect the Adminicles were most pregnant: and in special the Executions were yet extant and entire. *Monro Clerk.*

It is thought, that much Caution and tendernefs should be used in Processes of the Nature forsaide, for proving the Tenor of Comprisings; seeing Comprisings are to be considered, either as Decreets or as Executions; and in effect, they are both upon the matter; In respect the Messenger Decerns and Adjudges, and Dispones the Lands and others comprised; and therefore the same ought to be subscribed, both by the Messenger, who *in subsidium* doth that which the Partie ought to do, and doth dispoise his Estate in satisfaction of his Debt; and by the Clerk of the Comprising as a Decreet; and the Tenor of Decreets cannot be proven but by Extracts; And a Comprising being (as said is) *Processus executivus*, and ultimate execution; it ought not to be proven but *per relationem Nuncij*, and execution under the Messengers hands. And it were hard that executions should be made up by witnesses, and probation of the Tenor;

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Seing there may be a nullity in the same if they were extant : And tho witnesses may remember they had seen executions, they can hardly remember upon the precise tenor of all the words of the same : And if the tenor of the executions might be made up, there should be no security ; Seing Prescription, which is the greatest Security of the People, may be evacuated, upon pretence that there was an interruption by the execution of a Summonds ; but that the same being lost is made up by proving the Tenor : and by an Act of Parliement K. Jam. 6. Par. 6. cap. 94. *Its Ordained*, That the Tenor of Letters of Horning, and Executions thereof, is not probable by Witnesses : And there is parity, if not more Reason as to Compriings ; whereby the greatest Estates may be taken away, by a Decreet for proving the Tenor.

D. 284. *Hall contra Murray. 30. June 1675.*

**A** Arrestment being upon a Decreet ; and the said Decreet being there after turned in a Lybel ; *The Lords Found*, That the Decreet ceased to be a Sentence ; and the Arrestment thereupon, is now of the nature of an Arrestment upon a Dependence, and may be loosed. *Gibson Clerk.*

D. 285. *Dunmure contra Lutfoot. eod. die.*

**T**HE Lords in an Improbation *Found*, ( as they had done formerly in diverse Cafes ) That an Extract out of the Books of an Inferior Court does not satisfie the Production : the question being of a Write registrate in the Books of the *Canongate*. *Newbyth Reporter.*

D. 286. *Stewart contra Riddoch. eod. die.*

**J**ames Stewart of *Aberlechnoch*, having obtained a Decreet *Cognitionis Cause*, against *John Riddoch*, for implement of a Disposition, granted by *David Riddoch* his Grand-father : and thereupon having also obtained a Decreet of Adjudication, the same was stopt upon a Bill given in by *Campbel* of *Tarririck* ; pretending that he had a Right to a Contract of Mariage betwixt *Alexander Riddoch* and his wife, as assigney constitute by the said Mr. *Alexander*, in whose favours the Granter of the Disposition to *Stewart* was obliged by the said Contract to dispoise to him the same Lands ; And the Assignation granted by the said *Alexander Riddoch*, to the said *Campbel* being questioned as false.

The Lords thought fit to hear both Parties on their several Adjudications ; reserving Improbation of the said Assignation : and with this Declaration, that if the said Assignation should be improven, the Decreet and Adjudication upon the same should fall.

Because there was a Competition in Diligence, The Lords did wave the Debates in the Improbation ; being most as to that Point, who should abide by the said Assignation as true ; seing the Assigney *Campbel* declared, that his Name was filled up in the same without his Knowledge : and was not concerned to abide by the same : and Mr. *John Drummond* of *Megginsb* compearing, as having a compleat Warrant, and Commission from the said Mr. *Alexander Riddoch*, who was in *Barbadoes*, to prosecute the said Action, which had been intended in *Campbel's* Name, offered to abide by the said Assignation only as a Factor.

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Some of the Lords thought, that a Write being questioned as false, there should be some person to abide by the same upon their hazard simply; and not with such qualities; seeing the consequence and hazard of persons, that abide by Writes questioned upon falsehood, if the same should be improven, is the great bulwark and security of the people against falsehood, which doth encrease daily. But this point was not decided.

D. 287.

*Clerk contra Steuart. eod. die.*

A Husband, by his Contract of Marriage, having got the Right of the Fie of a Tenement of Land settled upon him; his Wife having resigned the same for Infeftment to him and her, and the Heirs of the Marriage; whilks failzieing his Heirs. He and his Wife did thereafter enter in a Contract with another Sister of his Wifes, who had Right to the equal half of the said Tenement, as Heir portioner with her Sister; by which Contract there was a mutual Tailzie with consent of the Husband; and the Right of Fie, that by the former Contract was settled upon her Husband, as said is, was disposed to the Wife; in sua far as both the Sisters, with consent of their Husbands, were obliged to resign their Respective parts, in favours of their Husbands and themselves in Liferent; and the Heirs of the Marriage in Fie; whilks Failzieing in favours of the Wifes Heirs: Which Contract was questioned by a Reduction at the instance of a Creditor of the Husbands; upon that reason, that the said Right of Fie granted by the said Contract betwixt the Husband and the Wife, and her Sister, was in defraud of the Husbands Creditors, and null by the Act of Parliament 1621. In sua far as the Husband had a Fie of the said Tenement, by the Contract of Marriage betwixt him and his Wife; which might have been affected with Execution at the instance of his Creditors; and the said Fie was given, by the said late Contract, to the Wife, so that the Husband had only a Liferent.

In this Procefs, *It was Alledged.* 1. That the Act of Parliament did militate only in the case of Dyvors, and Dispositions granted by them. And 2. That the said Act of Parliament doth only rescind Alienations that are made without true just and necessary Causes; and that the said Contract betwixt the Husband and his Wife, and her Sister was made for a true and just Cause; and the Fie of the said Tenement, which the Debitor had, was given away in respect of the Obligements of the said Contract in favours of the Husband the Pursuers Debitor; which was as equal as to advantages for the Pursuers Debitor, as they were for the other party; seeing both the Sisters their parts of the Tenement were provided in the same manner to the Respective Wives and their Husbands, and the Heirs of the Marriage; whilks failzieing the Wifes Heirs; and that the Pursuers Debitor was a person opulent for the time, according to his quality; and had sufficiency of Estate and Moveables otherwayes, that might have satisfied the Pursuers Debt the time of the said last Contract, and thereafter: So that the said Contract being valide *ab initio*, it could not be taken away upon pretence, that thereafter the Husband became insolvent; seeing it cannot be said, that the Husband did intend to defraud his Creditor, or that there were any fraud upon his part.

*It was Replied,* That tho the case of Bankrupts and their fraudulent practices mentioned in the said Act, being so frequent, did give occasion and also

Rise to the same; yet it appears evidently [by the said Act, that it was intended, that Debtors should not be in a capacity to give away any part of their Estate, in prejudice of their Creditors, to any person; In sua far as the dispositive words of the Act are in these terms, that in all Causes at the instance of a true Creditor, the Lords will decern all Alienations and Rights made by the Debtor, to any conjunct person, without true just and necessary Causes, and without a just price really payed; the same being done after Contracting of lawfull Debts from true Creditors; to be null without further Declarator: And the said Act does not bear, that all Rights made by Bankrupts should be Null, it being hard to give a Character and definition of a Bankrupt; So that diverse questions may arise anent the notion of Bankrupt; and what Debtors should be esteemed Bankrupt; and therefore for cutting off the same, the Act is conceived in the Terms foresaid; and annuls Dispositions made by Debtors without an Onerous Cause: And the Lords, by the Statute ratified by the said Act, do declare, that they intend to follow and practise the Laws Civil and Canon made against fraudulent Alienations in prejudice of Creditors: And by the Civil Law, all Rights and Deeds made and done in prejudice of Creditors without an Onerous Cause, are null, and may be rescinded *actione Pauliana*: And the Law doth presume, *presumptione Juris*, that they are fraudulent, being prejudicial to Creditors *ex eventu & re*; who are not obliged to say, that they are fraudulent *consilio*; which is *in animo* and hardly can be proven.

As that point, *viz.* That the said Contract was upon valuable considerations; *It is Replied*, That the taking of the Fie from the Husband, and giving the same to the Wife; it's a Donation as to the Wife in prejudice of the Creditor; So that there is no Onerous Cause as to the Husband.

The Lords, Upon Debate at the Barr and amongst themselves, did Find, that Debtors might dispose of a part of their Estate by way of Gift, and without an Onerous Cause; if they retain also much and more than would satisfy their Creditors: And therefore they Found the Defence Relevant, that the Debtor had also much Estate besides the Fie of the said Tenement, as would satisfy the Pursuers Debt. Actor Falconer alteri Stenart. Monro Clerk. *Præsentia*.

Some of the Lords were of the Opinion, That the case, being of so great consequence as to the preparative; it was fit to be thought upon: and urged these Reasons. 1. That the Words and Letter of the Law appear to be clear, against Deeds done by Debtors without an Onerous Cause. 2. Tho our Law were not clear, yet in cases of that nature, when we have not a Municipal Law, nor custom to the contrary, we ought to follow, tho not the Authority, yet the Equity of the Civil Law, which is received every where, where there is no custom to the contrary: Specially, seeing it is declared by the said Statute mentioned in the Act of Parliament 1621, That the Lords are to follow the Civil and Canon Law made against Deeds and Alienations in prejudice of Creditors. 3. It is hard, to put Creditors to dispute the condition of their Debtors, the time of making Donations; and whether they had effects and sufficiency of Estate to satisfy their Debt, notwithstanding the said Deeds; which may be unknown to the Creditors: It being sufficient to say, that the Deed was without an Onerous Cause; and that the Debtor became insolvent. 4. If a Debtor should become insolvent *ex post facto*, tho the time

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of the Donation, the residue of his Estate might have satisfied the Debt, It is more just and reasonable that a Donator, who has a Lucrative Title, should rather suffer *ex eventu* than a Creditor. did argue to the contrair.

D. 288. *Bonars Relict contra His Representatives. 2. July. 1675.*

A Bill of Advocation being Reported of a pursuite at the instance of *John Bonars Relict*, against his Representatives, before the Town of *Edinburgh*, for payment of 10000 *Merks*, conform to a Bond granted by him: The *Lords* did Advocate, not so much in respect of the importance of the Cause, the Town being competent Judges; but because there was an Improbation depending before the *Lords*, upon the same pursuite of the said Bond: And *contingentia causa non debet dividi*; and doth Found the *Lords* Jurisdiction to Advocate to themselves all Questions concerning the said Debt.

D. 289. Earl of *Dundonald* contra *Glenagies*, and the Earl of *Marr. eod. die.*

A Tack of the Teinds of *Kilmaranoch* being set by the Abbot of *Cam-buskenneth*, to Sir *James Erskine* for his Lifetime; and for the Lifetime of his Heir Male; and after the decease of the Heir Male, for the Lifetime of his Heir Male; and two 19 Years thereafter: The Earl of *Dundonald*, having Right by progress to the said Tack, pursued a Spulzie of the Teinds.

It was Alledged, That the Tack is expired: And if the Earl of *Dundonald* will condescend and prove that the said Sir *James* had an Heir Male surviving; the Defenders will offer to prove that two 19 years had expired since the decease of the last Heir Male.

The *Lords* Found, That the Pursuer should condescend upon an Heir Male, and prove that he survived the said Sir *James*: And if he should condescend and prove, that the Defender ought to prove (as said is) that the Tack was expired: And did Assign to the Pursuer and Defender to prove Respective.

D. 290. Mr. *Henry Morison. 3. July. 1675.*

UPon a Bill against Mr. *Henry Morison*; It was desired, that in respect he was an Advocate and Member of the House, he should summarly deliver certain Goods entrusted to him by the Complainer: And It was Alledged for him, That the Complainer ought to intent an Action *in communi forma*; And the Interest, that he had in the House as an Advocate should give him Right to any priviledge that belonged to an Advocate, but ought not to put him in a worse case than other Subjects, who could not be forced to defend upon such Bills: And the practice, that the Advocates should Answer summarly to Complaints against them, is only in relation to their Trust and Office, if they refuse to exhibite or deliver Writes entrusted to them: And the Trust mentioned in the Bill was only to him as *quilibet*, not as an Advocate.

D. 291.

contra

eod. die.

**A** Discharge, alledged granted by a Minister to one of the Heretors of the Paroch of a part of his Stipend, was quarrelled as false; and did appear to be vitiate; in a process at the instance of the Minister for his Stipend: And the user of the same being urged to abide by it, did offer to abide by it with a quality, *viz.* That the payment not being made by the Heretor himself, (but by his Tennent who took the said Discharge in the Heretors Name) he did abide by the same a Write truly delivered by the Tennent.

The Lords did not sustain the said quality; Unless the Heretor would produce the Tennent, and abide by the same as being truly subscribed and not vitiate; which the Tennent did.

D. 292.

Key contra Her Creditors. eod. die.

**T**HE Pursuer of a *Bonorum*, having given her Oath, that there was no fraudulent Deed done since the Disposition, whereby the Pursuer *cesserat* and Disposed *omnia bona*.

It was urged, That the Pursuer should declare also, that no fraudulent Deed had been done by her to defraud the Creditors, whether before or after the Disposition; which was refused by the Lords; in respect that the ordinary Oath given by such Pursuers did run in the Terms foresaid, that they had made no fraudulent Right since the subscribing of the Disposition; Some of the Lords were of Opinion, that the Pursuer should have declared, that she had done no fraudulent Deed at any time; seeing *cessio bonorum* is an extraordinary remedy, indulged to persons who are become *lapsed* upon some extraordinary occasion, without their own fault or fraud, and upon that account deserved favour; which was not to be given to *fraudatores* who at any time had taken indirect wayes to prejudice their Creditors: And if the Pursuer, the very day before she subscribed the Cession and Disposition, had made an anterior Right to prejudice her Creditors, it were most inconvenient and absurd, that her Oath should only be received in these Terms, that she had made no Disposition or fraudulent Deed since the granting of the Disposition in favours of the Creditors: And as to the pretence of custom and the conception of the Oath; it ought not to be respected; seeing it cannot be said, that the Oath of Bankrupts, in the Terms that it is now urged, was desired and refused; and if there had been any defect in the conception of the Oath it ought to be helped.

D. 293.

Bairdner contra Colzier. eod. die.

**I**N a Process for abstracted Multures: The time of the advising of the Cause, these points were debated amongst the Lords, *viz.* Whether or not, the Right of a Miln, being Feued by the Abbot, in these Terms *cum astrictis multuris*, did import astriction of all the Grains growing; so that these that were astricted should be Lyable to bring all the Corns that grew upon the Lands to the Miln; and in case any such be sold the Heretors and their Tennents should be Lyable for astricted Multures: And 2. There being Decreets recovered at the instance of the Feuar of the Miln

Miln, against the Feuars of the Lands, for abstracted Multures of *grana crescentia*, if the same should import Astriction as to all such Granes, tho neither the Right of the Feuair of the Miln, nor of the Heretors of the Lands be exprefs of *grana crescentia*; but only of the Terms foresaid *cum astrictis multuris*.

Some were of the Opinion, as to the first point, That a Feu of a Miln in the Terms foresaid *cum astrictis multuris*, should import nothing else but that they that were within theucken and astriction should be lyable, only to grind at the Miln all such Corns that they should have need and occasion to grind; Seing Thirlages are a most odious servitude and ought to be taken strictly: And Multures being *Molitura* and due for grinding, they ought to be understood only in the case of Corns which the Feuars do bring to the Miln to grind; or which they have need and use to grind; and yet abstract and go to other Milns: Otherwayes there should be no difference betwixt the Astriction of *grana crescentia*, and an ordinary astriction.

2. The case in question was of a Miln Feued by the Abbot of Culross, and of Lands likewayes Feued by himself after the Feu of the Miln, and the time of the Feu of the Miln Lands being the Abbots own, either in mainfing, or set to Tennents; It cannot be thought, that the Astriction was in other terms than such as Tennents are in use to be astricted to their Masters Miln; and beside the Teind and Seed, and the Duty payable to the Master; which being payable to the Abbot the time of the Feu of the Miln was free of astriction; the Tennent having the residue of the Rent for entertaining of his Family, and for defraying the Charges of the Labouring, and Servants Fies; and other necessar Expences which could not be defayed otherwayes, but by selling some of the Corns growing: It cannot be conceived that the Abbot or any other Master would astrict his Tennents in these Terms, that they should be lyable for dry Multures, except it were exprest, and that the Astriction had been *granorum crescentium*. Yer the Lords did demurr as to this point, In respect it was vehemently urged by

that the Astrictions in the Terms foresaid ought to be understood of *grana crescentia*; otherwayes it should be in the power of these who are astricted, to sell all their Corns, and to buy Meal for their Family, and so to elude the Thirlage: Albeit It was Answered, That it was not to be presumed that Feuars or Tennents would do so; and if they did, they ought to be lyable for abstracted Multures esseirand to such quantities as were necessary, and they were in use to grind for their Families.

Another point was Agitated and debate amongst the Lords, viz. That the said Decreets could not be obruded to the Defender; seing neither he nor his Author was called to the same, and *res was inter alios acta*: But the Lords did not decide these points, but recommended to some of their number to endeavour to settle the Parties.

D. 294.

Oliphant contra

7. July 1675.

Oliphant desired an Advocation from the Town Court, upon these Reasons, viz. 1. That the Lybel was to be proven by the Defenders Oath which he was to qualifie. And 2. That the Defender was to prove a Defence by the Pursuers Sons Oath, who was



was out of the Country; and the Town could not give a Commission for taking his Oath: Both which Reasons were thought not to be Relevant and the Advocacion refused; In respect all Judges ought to receive Oaths with intrinsick qualities, and Commissions may be direct by any competent Judge.

D. 295. Lord Halcartoun contra Robison. July 1675.

THE deceast Lord Halcartoun being obliged, by Contract betwixt him and his deceast Father, to Infeft Mistress Margaret Falconer his Sister, in an Annualrent of the principal Sum of 1000 Merks out of the Lands of Halcartoun redeemable upon 1000 Merks: And to pay the principal Sum upon Requisition. Sir Patrick Falconer immediat Younger Brother and Heir of Line to the said Mrs. Margaret, Assigned the said Sum and Contract in favours of Robert Robertson; And the said Robert having intended Action against the now Lord Halcartoun as representing his Father, *It was Alledged*, That the said Sum being conquest in the person of the said Mistress Margaret, it did not belong to the Heir of Line, but to the immediat Elder Brother as Heir of Conquest.

The Lords, having heard the Cause *in presentia*; and being resolved to decide the question, betwixt the Heir of Line and Heir of Conquest, as to Heretable Bonds, bearing such Obligements to Infeft; which had been often before in agitation, but never decided but the time of the *English*; Did Find, that the said Bond and Sum did belong to the Heir of Conquest, who would have succeeded, in case the Right had been perfected by an Infeftment.

Some of the Lords were of the Opinion, That Bonds of that Nature should belong to the Heirs of Line, for these Reasons. 1. That the Heir of Line is General Heir and *Successor in universum Jus, tam active quam passive*, and is lyable to the *Onus Tutela*, and other Burdens; and *penes quem onus, penes eundem emolumentum*; unless the benefit of Succession be provided otherways, either *Provisione hominis*, in the Case of Tailzies; or *Legis*, and there is no Law settling upon the Heir of Conquest, the Right of Succession as to Heretable Bonds, whereupon no Infeftment has followed: And the Law of the Majesty, is only in the Case of *Terra & Tenementa & Feuda*, as appears by the very Words of the said Ancient Laws; and by Craig and Skeen *de Verborum significatione, in verbo Conquestus*, and *verbo Breve de morte antecessoris*. 2. As Bonds cannot be called Heretage, so they cannot be esteemed to be Conquest; Heretage being properly Lands, wherein a Person succeeds as Heir to his Predecessor: and if the Heir of Conquest, who is now found to have Right to such Bonds, should de cease, tho the samen would descend and belong to the Heir of Line, yet such Bonds cannot be called Heretage: And Minors *qui non tenentur placitare de hereditate paterna*, could not plead the same Priviledge in the case of Heretable Bonds.

3. Lands and *Feuda* can only be said to be Heretage, or to be Conquest, when Parties have a real Right to the same by Infeftment; but as to Bonds, they do not settle *Jus in re*, but at the most, a *Jus ad rem*.

4. Comprisings, Dispositions, and Reversions, being more of the nature of Conquest, especially Reversions, which are real Rights, and do militate, not only against the Granters, but singular Successors, do descend

descend and pertain to the Heir of Line, and not to the Heir of Conquest.

D. 296. *Veatch contra Pallat.* 10. November 1675.

**T**HE Lords, in the Case beforementioned (February 9 and 12. 1675) *Veatch against Pallat*, having resumed the Debate; and it appearing upon Tryal, that the Common Debitor *Sanderson*, the time of the granting of the Assignation in anno 1662 in favours of *Ker* and *Brown*, was not only *Rebell* but was in effect *Fallitus* and *Lapsus*: They preferred *Veatch* to *Pallat*.

D. 297. *Gibson contra Rynold and Taylor.* 16. November 1675.

**A** Disposition being made by a Woman cloathed with a Husband, of her Liferent of a Tenement, redeemable upon the payment of a certain Sum within a short Term thereinmentioned allanerlie: A Decreet of Declarator of the expiring of the Reversion was obtained; and thereafter a Decreet of Removing at the instance of the Person Infeft upon the said Disposition, against the said Woman and her Husband: Whereof a Reduction and Suspension being raised, upon that reason that the suspender was cloathed with a Husband the time of the expiring of the said Reversion, and of the said Decreets; so that *non valebat agere* nor use the Order of Redemption: and the Husbands Negligence in suffering the Reversion to elapse, and the said Decreets to be obtained, ought not to preiudge her; seing she was content yet to purge by payment of the Sum contained in the Reversion.

The Lords, upon Debate amongst themselves, had these Points in consideration, *viz.* 1mo. Whether or not a Redemption, being limited and temporary (as said is) in the Case foresaid; there may be yet place, after the elapsing of the Term, to purge: And some of the Lords were of the Opinion, that Reversions being *stricti Juris*, there can be no Redemption, neither in the case of Legal nor Conventional Reversions, after elapsing of the Term; nor place to purge: But this Point was not decided. 2. It was agitat, whether a Woman cled with a Husband, may be heard to purge, upon pretence that *non valebat agere*: as to which Point, some of the Lords did demurr, and it was not decided: The Letters being found orderly proceeded upon an other Ground, *viz.* In respect of the Decreet *in foro contradictorio*: But it is thought, that such Reversions should expire even against Women cloathed with Husbands, seing it cannot be said that they are in the case of Minors and *non valentes agere*, because they are cloathed with a Husband; And by the contrary, having the assistance and advice of their Husbands, they are more able to go about their Affairs: And if their Husbands refuse to concur, they may apply to the Lords, and desire to be authorized by them. *Strathurd* Reporter. *Monro* Clerk.

D. 298. *Halyburton of Innerleith.* 17. November. 1675.

**T**HE Lords, upon a Bill presented by *Halyburton* late of *Innerleith* Prisoner in *Edinburgh* for Debr, did permit, that until  
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January next, he should in the Day-time go out with a Keeper; the magistrates being lyable if he should escape: This was done upon pretence, that he intended to settle with his Creditors, which he could not do unless he were allowed the Liberty foresaid: But some of the Lords were of the Opinion, that the Emprisonment of a Debitor, being the ultimate length of Execution; and not only *custodia causa*, but in effect that *radio* and *fatore carceris*, Debtors may be driven to take a course with their Creditors; That therefore the Lords had not power to give any Indulgence or Permission, contrare to Law, and in prejudice of Creditors, without their consent.

D. 299. Mr. Vanse. 18. November 1675.

Captain Martine being pursued before the Admiral, for wrongs done by him in taking free Ships and Goods, upon pretence that he was a Caper; and that the same belonged to the Kings Enemies: and having desired an Advocation, the Lords thought fit that he should find Caution: and because he refused, and pretended he was not able, did commit him: and thereafter he having escaped out of the Tolbooth of *Edinburgh* in a disguise, and in Womens Cloaths; Mr. Vanse, Keeper of the Tolbooth, did give in a Bill, representing, That there being so great a number of Prisoners, upon account of Conventicles, and for Criminal Causes, and the said Captain being incarcerate, not for a Crime, but for not finding Caution, he was *in bona fide* not to look upon him as a Person that would escape: and there being so many Persons who had access to other Prisoners to furnish them Meat, and upon other Occasions, the said Captain his Escape, in manner foresaid, was such, as the most faithful and diligent Keepers might have been surprized and imposed upon: and therefore did desire that his Carriage might be tryed by the Lords; and if they should find him innocent, that he may be cleared.

It was thought by some of us, That the Desire foresaid, resolving either in an Absolvitor, or a Declarator of his Innocency; *The Lords* could not give a Sentence as to either in Form; unless either there were a Pursute against Mr. Vanse, at the Instance of the Persons concerned; or a Declarator at his instance, against them being called: and any Sentence that the Lords should give, the Parties concerned not being called, will be no security to the Petitioner: And whereas it was pretended, that this being an Incident, and a Dependance before the Lords, they may proceed upon it, as accessory to the said Dependence.

*It was Thought*, That the suffering the Prisoner to escape, tho it had a dependence upon the Process, yet could not be called an Incident, but a *delictum*, whereupon did arise a ground of Action against the Petitioner, both at the instance of the Town of *Edinburgh*, who were directly lyable to Creditors for the escape of Prisoners; and at the instance of the Parties concerned: and therefore their Interest and Action could not be prejudged in so summar a way upon a Petition; they not being called: Whereas such Actions, being both of importance as to the matter, and of difficulty and intricacy, do require not only citation of Parties, but all the ordinary Solemnities of Process, both for introducing and discussing the same. *Vide infra Novemb. 23.*

D. 300.



D. 300. *Warden contra Berry.* 20. November 1675.

**T**HE Lords Found, That an Arrestment upon a Decreet, after it was suspended, may be loosed upon Caution. Done upon a Bill. *Hamilton Clerk.*

D. 301. *Vanse contra Sandilands.* 23. November 1675.

**I**N the Case abovementioned, concerning the Escape of Captain *Martine*, and the Bill given in by *Patrick Vans*; which was given up to *Sandilands* Commissioner for the parties concerned, and to his Procurators to see and answer this day: It was Represented for *Patrick Vans*, That Keepers of Prisons are in effect *Depositarij*; and that Prisoners are entrusted and depositate to be kept by them; And in Law *Depositarius tenetur* only *de dolo & lata culpa*; and the Petitioner could be charged with neither: And the Prisoners Escape, in a disguise, is such, as might have surprised and imposed upon the most circumspect and diligent Keeper: And diverse Instances, from Lawyers and Story, were adduced of Escapes of that nature, of prisoners in disguise; and of the Impunity of Jailors being free of Fraud, and any accession to the same: Whereunto *It was Answered*, That the Keepers of Prisons are not *Depositarij*, but publick Servants and Officers; and in all cases of any Trust or Charge, when the same is not gratuitous and *dantis causa*, but likewise *causa accipientis*, and *ubi intervenit merces*, these who are trusted *tenentur prestare culpam levissimam*: And seeing it cannot be said, that the Prisoner escaped *vi majore*, which could not be resisted; nor *casu fortuito*, which could not be foreseen or prevented, the Keeper, and his Servants, for whom he should answer, cannot be said to be free of *culpa*: And albeit *quævis causa excusat a pena*, where there is no *dolus*, and the Instances adduced do militat only to that purpose; it cannot be instanced either at home or abroad, that Magistrates and *custodes Carcerum* under them, were found not to be lyable in *subsidium*, for damage and interest for the escape of Prisoners: and yet the Lords enclined to free the Petitioner: and that it may appear to be done the more warrantably, they ordained him and his Servants to be examined concerning their Knowledge of the said Escape.

Some of the Lords were of the Opinion, That it was to no purpose to examine the Parties themselves; and tho they had Charity for the Petitioner, that he was not conscious or accessory to the said escape, yet that he and his Servants, for whom he should answer, could not be thought to be free of *culpa* and negligence; and that it was hard, for securing him from prejudice, to unsecure the People: and if such a preparative should be sustained, it would be of dangerous Consequence, and not only a prejudice, but a discouragment to the People, if after the extremity of Diligence and trouble, Prisoners for Debt, or upon other accounts, should escape *impune*, upon such pretences: And it was remembred, that upon the Occasion of the Indulgence, and Favour to Keepers of Prisons in *Edinburgh*, there had been of late diverse Attempts and Escapes; and in this instant Year, one being taken for a High-way Robber, and imprisoned in *Edinburgh*, had escaped without any Censure or Punishment of the Servants of the House. *Vide supra November 18.*

D. 302.

D. 302. Mr. *James Eleis* contra *John Hall* and others.  
24. November 1675.

**I**N a Suspension of multiple poinding, at the instance of Mr. *James Eleis* of *Stainhopmilns* against *John Hall* and the other Creditors of *Mistress Masterton* and against the Creditors of *James Masterton*; It was Found, that *Mistress Masterton* the Relict, not being confirmed Executrix Creditrix to her Husband; her Husbands Creditors are preferable as to any Goods and Debts extant and undisposed of, which belonged to her Husband; In respect albeit the Right of the same was established in the person of the Executrix, yet they did pertain to her as Executrix, and as having a Trust and Office; And to the effect the Testament may be Execute; and what is confirmed should be made forthcoming to all Parties having Interest; and consequently to the Defuncts Creditors, and not her own: And the Executrix has not an absolute property in the Goods confirmed, but only qualified and for Administration, and to the effect foresaid.

2. It was Found, That a Servant, for his Fies, is not privileged and preferable to other Creditors.

3. *James Masterton* having granted a Bond for payment of a considerable Sum, after his own and his Wifes decease, in case he should not have Children of his own Body; It was Alledged, That the said Bond, being without an Onerous Cause, and not being effectual until after his decease, as said is, and failzieing of Heirs of his Body; was of the nature of *donatio mortis causa*, and could not affect the Relicts part: Whereunto It was Answered, that the said Bond being granted when he was *in liege poustie*, and had power as *Dominus* to dispose of his Goods, or to grant Bonds which might affect the same; The Relict could have no Legitime, but of the free Gear; the said Bond and other Debts being satisfied.

Some of the Lords were of the Opinion, that the Bond should affect the haill Goods: But others thought that it ought to affect only the Defuncts part; seing there is a Communion betwixt Husband and Wife; and albeit the Husband is said to be *Dominus*, and has full Administration of the same, so that he may dispose thereof, and grant Bonds for Onerous Causes; yet he cannot, in prejudice of the Communion and the Wifes Interest foresaid, dissipate and give away the same by fraudulent Donations, of purpose to prejudge either the Relict or the Children of their Legitime: But this point was thought fit to be heard and debated *in praesentia*.

D. 303. *Forbes* of *Colloden* contra *Rofs* and others.  
26. November 1675.

**A** Decreet, at the instance of *Forbes* of *Colloden* against *Robert Rofs* and others, before the Commissar of *Rofs*; being questioned upon that Ground, that the said Commissar had committed Iniquity in Repelling Relevant Declinatures; whereof one was upon the account of his Relation to the Pursuer, being the Commissars Uncle: And an other was upon account of the nature of the Action, Alledged not to be consistorial; and the subject of the Process, tho it had being proper otherways, yet being

being far above the Sum of 200 *Merks*, was such, as by the Regulation, the Commissar could not be Judge in: And likewise in respect, that the Commissar did assume to himself a Power to modify a great Sum, extending to above 6000. *lib.* for the Charges the Pursuer had been at in prosecuting a Plea by warrant of the Defenders, and wherein he and they were concerned: And the said Modification was upon no other Probation but the Pursuers Oath; and that the modifying of so large a Sum did belong *ex nobili officio* to the Lords of Session *privative*.

Some of the Lords were of the Opinion, That the Commissar, notwithstanding of the Relation foresaid, could not be declined; seeing there is no statute that Judges may be declined upon that account: And by the Act of Parliament 212. K. Ja. 6. His 14. Parl. *Anent the Declining of the Lords of Session*; There is no other Relation that can be a Ground of Declinator, but where the Judge is related to either of the Parties, as Father, Brother, or Son: And yet others were of the Opinion, that a Nevy, being of so near Relation, may and ought to be declined; In respect by the Common Law, persons of that Relation are most suspect; and cannot be Judges: And by the said Law, a Judge may be declined upon any Ground that may decline a Witness; and there is more reason to decline Judges than Witnesses, seeing there may be penury of Witnesses, and they may be so necessary, tho related to the Parties, that others cannot be Found: And the said Act of Parliament, as all Acts of Parliament, especially such as are correctory *Juris communis*, ought to be taken strictly; and cannot militate, but in the case therein intended and exprest: And the said Act is upon special considerations, in Relation to the Lords of Session, and particularly, of the Eminent Integrity that is presumed, and ought to be in the Supreme Judicatory.

The Lords, without entering upon the Debate of the said other points, turned the Decreet in a Lybel. *Forret* Reporter. Clerk.

D. 304. *Anderson of Dowhill contra Lowes.*

27. November. 1675.

*William Gibson* did Dispose to *William Norvel* his Son in Law and *Elizabeth Gibson* the Disponers Daughter, certain Aikers near *Glasgow*; which thereafter the said *William Norvel* did Dispose to *Thomas Norvel* his Brother; And by a Right from the said *Thomas* thereafter did pertain to *Anderson of Dowhill*.

But *John Lowes*, having thereafter Married the said *William Norvels* Relict *Elizabeth Gibson*; and having, upon an Assignment to a Debt of the said *William Gibson*, adjudged the said *Williams* Right from his Apperand Heir: And having pursued an Improbation and Reduction of *Dowhills* Right; and in special of the foresaid Disposition made by the said *William Gibson* to the said *William Norvel*; *Dowhill* was forced to pursue for proving the Tenor of the said Disposition, which was out of the way; and which he pretended to have been in the Hands of the said *Elizabeth Gibson*; and to have been abstracted by the said *John Lowes* her second Husband, intending to patch up the Right foresaid; And these Adminicles bein Lybelled, *viz.* That the said *Elizabeth Gibson* being pursued at the instance of the said *Thomas Norvel* before the Court of *Glasgow*, for Exhibi-

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bition of that Disposition ; the said *Elizabeth*, for obtaining a Suspension of the Decreet of Exhibition recovered against her, did consign in the hands of *Henry Hope* the said Disposition and other Writes ; and that thereafter the said *Thomas Norvel*, upon the said Disposition, did obtain a Decreet *cognitionis causa*, before the Baillies of *Glasgow* ; In which the said Disposition is mentioned as produced : And thereafter the said *Thomas* did also obtain an Adjudication of the said Aikers, wherein also the same was produced : And that there is an attested double of the said Disposition, which is written by *James Galbraith* Agent, and attested by two famous Notars.

The Lords admitted the Summonds to Probation ; And diverse Witnesses being Examined, and in special the said *James Galbraith*, and these who were Servants to the Clerk of the Court of *Glasgow*, the time of the obtaining of the said Decreets *Cognitionis causa*, Adjudication, and others : After much debate, before advising, *in presentia*, and amongst the Lords themselves ; Some of the Lords were of Opinion, that pursuives, of the nature foresaid, being of so great importance, and tending to make up a Right to Lands which may be of great value ; The Adminicles ought to be in Write and most pregnant ; and that in this case, tho there might be ground of presumption, yet it cannot be said, that there are clear Adminicles in Write ; In sua far as the attested double cannot be considered as an Authentick Write, and it wants a date : And as to the Decreet of Adjudication, tho it mention the production of the Letters of Disposition, yet it appears by the Depositions of the Witnesses, and it was granted at the Barr, that the principal Disposition was not produced, but only an attested Double, and needed not to be produced ; the Decreet *cognitionis causa* being sufficient to instruct the Pursuers Title in the Adjudication : And as to the Decreet *Cognitionis causa*, that it is not a sufficient Adminicle, seing both it and the Decreet of Adjudication, bearing the Production in the same Terms, there might have been the same mistake in the Decreet *Cognitionis causa*, that is confest to have been in the Adjudication, *viz.* That the Attested double being only produced, yet the Production is made to bear the Disposition ; and there being so short a time betwixt the Decreet *Cognitionis causa* which was the 13. *February*, and the Adjudication which was on the 24. of the same Moneth, it is to be presumed that the attested double has been produced in both : And seing in such pursuits for proving of Tenors *rei gesta veritas* ought to be proven ; yet it does not appear, by the Testimonies of any of the Witnesses, that they knew that there was a Disposition truly subscribed by the said *William Gibson* to the said *William Norvel* ; and a pretended Disposition might have been produced the time of the obtaining of the said Decreets ; and might be truly doubled ; and yet be a false Write : And it were of a dangerous consequence, upon such pretences and Adminicles, to make up an Authentick Write, to have the force of a principal Disposition as to all effects ; especially it being considered, that even Extracts do not satisfy in Improbations, tho out of the Registers of the highest Judicatories ; by reason that Parties concerned will be prejudged of the means and indirect Articles of Improbation, arising upon the sight and production of principal Writes, by compareing Hand-Writes and Subscriptions and others : And if Tenors, being made up, should be of more force than

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Extracts, there should be the same Inconvenient and hazard to the People; and a Door should be opened to contrivances, if after Papers are produced in Judgement, they should be destroyed of purpose, and the Tenors of the same should be thereafter made up by a Decreet, which should satisfy the Production in Improbations.

The Lords thought fit again to Re-examine the said James Galbraith, before they should proceed to Sentence: *Vide 15. February 1676. inter eosdem.*

D. 305. Blair contra Kinloch. 30. November 1675.

**M**R. George Blair, being called in an Adjudication at the instance of Kinloch of Gourdie, as Superior of the Lands craved to be Adjudged; did alledge that they could not be Adjudged, because they did belong to him by a Disposition and Resignation thereupon *ad remanentiam*: *It was Answered*, That Adjudications are now in place of Compyryngs; and as such Debates were not competent against Compyryngs the time of the deduceing of the same, so they ought not to be admitted against Adjudications; seing Compyrsers and Adjudgers do Adjudge or Comprise upon their own hazard: And if the Debitor has any Right or Interest, it ought to be Adjudged; and if he has none, there is no prejudice to any person.

The Lords Found, That there being no Competition of Creditors, and no hazard of retarding the Pursuers Diligence upon that account; the Defender being called might propone the said Defence; and ought not to be put to Trouble and Charges to appear in any other Process for Mails and Duties, or Removing; Especially seing he was content, that if the Pursuer had a Reduction, as he pretended, of his Right, that it should be discusst presently; and tho he had no Reduction, that what he could say against his Right should be heard and discusst by way of Reply. *Forrest Reporter.*

D. 306. Mr. Vanss contra Sandilands. 1. December 1675.

**I**N the case abovementioned 18. and 23. of November. Vanss contra Sandilands. The Lords having Examined the Servants of the Tolbooth and Captain Martines Wife, Found that Mr. Vanss being free of any suspition of Fraud, or Knowledge and accession to the escape of Captain Martin; ought not to be Lyable to any hazard for the same.

D. 307. Barclay contra Arbuthnet. 3. December 1675.

**C**ollonel Barclay, having produced *in termino* a Relaxation unregistrate, for proving a Defence, Founded upon the Relaxation. *It was Alledged* before the Lord of the Outer-house, that the Term ought to be circumduced: Whereunto *It was Answered*, That it could not be circumduced, since he had produced the said Paper, and *Avisandum* ought to be made, that the Lords might advise, whether it proves or not.

The Lords Found, That in such Cases, where possibly a blank Paper, or a Paper of an other nature than that which was to be produced, is produced *in termino*; the Judge may and ought to circumduce the Term; where it is evident, that such Papers are produced, not to satisfy, but to delay

delay and abuse the Judge: But in this case, seing it was found, That Collonel *Barclay* had produced sufficiently *ad victoriam causæ*, so that there may be some ground of doubt and debate; *The Lords Found*, That it was competent only the time of the advising. *Gosfoord Reporter.*

D. 308. Lady *Mouswel* contra the Creditors of *Mouswel*.  
*eod. die.*

**I**N a Suspension of multiple Poinding against *Agnes Rome* Lady *Mouswell* and her Children, and *Douglas of Dornick*, and the other Creditors of *Mouswell*; The said Lady desired to be preferred for an Annualrent of 1000. *merks* yearly, wherein she was infest: *It was Answered* by the Creditors, that she had Right only to an Annualrent of 800 *merks* yearly, having restricted her self to 800. *merks*, by a Contract and Agreement betwixt her and her freinds of *Mouswell*: Whereto *It was Replied*, That the Restriction was personal in favours of the Heir of *Mouswell*, and *intuitu* of the Obligements contained in the said Contract; that the Friends should undertake the Sums mentioned in the said Contract *respective* which they had not done: And albeit *It was Duplyed*, that the Minute does bear a positive and absolute Restriction, and Renunciation of 200 *merks*, and that there is no Provision or Clause irritant in the Minute, that if the Obligements upon the other Contractors were not fulfilled that the Restriction should be void; Yet *The Lords* preferred her for the whole Annualrent, Norwithstanding of the Restriction foresaid: Which appears to be hard, Seing some of the Creditors, who did compete with the Lady, were not Contractors and obliged by the said Contract; And the foresaid Restriction was not in favours of the Creditors who were obliged by the said Contract, but in favours of her Son the Heir; And the benefite thereof doth accrue to his Creditors who had comprysed; and does in effect redound to the advantage of the Heir and his Successors; Seing the Creditors will be the more easily satisfied, the burden of the Ladies Liferent being restricted, as said is: and the other Creditors, who had not fulfilled their Obligements, may be pursued for implement of the same: And it is a great in consequence, that because they had not fulfilled their part, that therefore the Ladies part, which was fulfilled and execute, should become void: and the pretence, that the Restriction foresaid was *causa data non secuta* is of no weight; seing the *causa* was the Obligation of the Creditors, which they might be compelled to fulfil. *Hutton Reporter.*

D. 309. *Cuninghame* contra *Maxwel*. *eod. die.*

**A**Bond being suspended upon a Reason of Compensation, *viz.* That the Suspender had debursed diverse Sums (conform to an Accompt) for the Charger: and the said Reason being referred to the Chargers Oath, and deferred back again to the Suspenders Oath; it was debated among the Lords, *a quo tempore* Compensation should be sustained; whether from the time of the debursments, or from the time the same was liquidat and cleared by the Suspenders Oath. And it was *Found*, That Compensation should be sustained from the time of the Debursments: seing the said Sums then grew to be due.

Debts



Debts being illiquid, either because not constitute by W<sup>r</sup> te or Decreet; or because they are not due in Money but in Vi<sup>ct</sup>ual, or such like; which must be liquidat, as to the Prices and Value, before there can be any execution for the same; the Question may be of greater difficulty as to the last, *seing compensatio is solutio, and ipso jure minuit*; whereas a Debt in Money, cannot be said to be payable, and far less to be payed in Vi<sup>ct</sup>ual, unless the Creditor be content to be satisfied that way.

D. 310. *Dalling contra McKenzie. 7 December 1675.*

A Woman is understood to be *præposita negotiis domesticis*; so, that for the Provision of her House, she may take from F<sup>l</sup>eshers and Baxters and others such Furnishing as is necessary: and her Declaration and Oath may be taken, and ought to be trusted as to the same: and the Husband is presumed not to know the particular Quantities: and these who do furnish, are not obliged to enquire, whether her Husband has given her Money sufficient to provide his House, if she be a Person that is not inhibited: *seing the Husband has a remedy, if he has any suspicion that she may abuse and wrong him, and may inhibit her.* *Glendoch Reporter.*

D. 311. *Sheriff of Perth contra eod die.*

*IT was Found,* That the late Proclamation, remitting Fines due upon the contraveining of Penal Statutes, ought to be extended to Ryots and Fines, upon the committing of the same before the said Proclamation; the Persons being thereafter Convict before the Sheriff. *Glendoch Reporter.*

D. 312. *Lord Arnistoun contra Patrick Murray of Deuchar. 8. December 1675.*

W<sup>H</sup>en Lands are pretended to be thirled to a Mill, the Heretor has good interest to pursue an Improbation against the Heretor of the Mill, of all Rights and Writes, bearing exp<sup>r</sup>ess constitution of the said Servitude: But that General, *viz.* That the Defender should produce all Writes, which may import Thirlage, ought not to be sustained; in respect there may be Writes importing Thirlage consequentially, which the Defender is not obliged to know, what the import of the same may be; and it were hard, that upon pretence of such an Interest, the Defender should make his Charter Chest patent to the Pursuer: and the Pursuer has a Remedy, if he apprehend that the Defender may trouble him, upon pretence of Writes, which may import consequentially Thirlage, he may force him to produce the same, by intenting a negatory Action and Declarator of Freedom.

D. 313. *Laird of Wamfray. eod. die.*

THE Act of Parliament against Protections. 3<sup>d</sup>. Sess. of His Majesties 1<sup>st</sup>. Parl. Cap. 3. giving Power to the Lords of Session, and Exchequer, Privy Council, and Justice General, to grant Protections to persons summoned to appear before them; is only to be understood in that case,

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case, when they are obliged to appear personally to give their Oaths, or to be Witnesses; and cannot appear by Procurators: And such Protections ought not to be granted upon pretext, that Processes of Compt and Reckoning and others cannot be managed without their own presence: And this was *Found* upon a Bill given in by *Johnstoun* of *Wamfray*; whereby he desired a Protection.

And yet it is thought, that in some cases, where it is evident that there is a necessity of the Defenders presence to give Information in the point of Fact, especially in general Actions of Compt and Reckoning, Protections ought to be granted.

D. 314. *Veitch contra Hamilton. 9. December. 1675.*

**A** General Action of Compt and Reckoning, at the instance of Pupils and Minors *Post tutelam & curatelam*, against their Tutors and Curators, is not consistorial and competent to be pursued before the Commissars; where the import of the Action exceeds the Sum and value to which the Commissars may be Judges: And the pretence, that there are diverse Articles, and none of them doth exceed the said Sum is of no weight; seeing the Reply of *articulatus Libellus* is only in the case, where the Debtor is pursued for diverse Sums, which in effect resolves in diverse Actions: Whereas *actio tutela* is but one general Action and upon one Ground, *viz.* The Defender is Lyable as Tutor and Curator, whatever and how many soever the Articles of Intromission be: And upon the Ground foresaid, the pursuite before the Commissars was Advocate. *Newbyth* Reporter.

D. 315. The Creditors of *James Mastertoun*, and of his Relict *Alice Thine. eod. die.*

**B**Y our Custom and the Custom of diverse other Nations, tho there be a Communion betwixt a Husband and a Wife as to Moveables; yet the Husband dureing the Marriage has not only Administration, but is *Dominus actu*; and may dispose of the same, not only for Onerous Causes, but by way of Donation; and the Wife has only a Right and Interest *habitu*; which *exit in actum* after the Marriage is dissolved; as to all the Moveables belonging to them, the time of the Dissolution.

And yet if the Husband dispose of his Moveables *in fraudem*, and of purpose to prejudice the Wife, and to evacuate her Legitime and part of the Moveables; as was Alledged in the case in question; the circumstances being such as did evince the Husbands fraud and purpose to settle his Estate upon his near Relations after his Death; in prejudice of the Wifes Interest; such Donations will not be sustained.

The said *James Mastertoun*, having made a Disposition in favours of his his Wife, with the burden of his Debts, so that his Creditors should not be prejudged; but that the said Right should be affected with the said Debts; It was debated among the *Lords*, what the import should be of the said Clause; and if the Creditors of the Husband had thereby a real Interst in the Goods; or only a personal Action against the Receiver of the Disposition: And it was thought, that the Goods being extant and undisposed of; the Receiver of the Disposition with the said quality, was in the case of a Trustee or Executor: And the Creditors of the Husband

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competing, upon their Diligence, to affect the same with these of the Wife, would be preferable: But if they were disposed of by the Wife, tho the price be not employed for the use of the Creditors, tho they be extant the Husbands Creditors has no Interest in the same; seing the Wife was *Domina* and might sell the same; and Buyers finding her in possession, are not concerned to enquire what way she should employ the price. *Vide infra* 17. December 1675. *Thomson contra Eleis.*

D. 316. Scot contra Kennedy. 10. December. 1675.

A Father, or any other person disposing his means, may qualify his own Gift; and in special with that Provision, that if the persons be Pupils or Minors, the same should be Administrate by the persons named in the said Disposition; and yet these, in whose favours the Disposition is made, may choose Curators, who will have the Administration of any other Estate belonging to them: But if they be *Puberes* their persons are free; and neither of the said Administrators can pretend to the keeping of them, *quia curator datur rebus.*

D. 317. McKneish contra Bryce and her Husband.  
*eod. die.*

A Woman being pursued upon a Bond; and having alledged, that it was Null, because she was *vestita viro*: The Reply, that she promised payment after her Husbands decease, tho the Sum was only 100 *lib. Scots*, was Found not to be probable by Witnesses. *Glendoich Reporter.*

D. 318. contra 16. Decem. 1675.

THE Lords Found, That a Merchant being in use to furnish diverse Years; That a current accompt did not prescribe; Tho some were of Opinion, that the Act of Parliament bearing no distinction; the Articles of Accompt ought to prescribe from their Respective Dates; Seing otherways the Act of Parliament may be eluded, both in the case of Compts and other cases, which prescribe by the Act. *Neroy Reporter.*

D. 319. Wilson contra Deans. 17. December. 1675.

IT was Found, That a Woman keeping a Shop, and Traffiqueing as a Merchant with the knowledge of her Husband, he is Lyable for Debts Contracted by her, upon the account of her Traffique, *Actione institoria.* *Forret Reporter.*

D. 320. Thomson contra Mr. James Eleis. *eod. die.*

THE Lords Found, In the case of a Right of Moveables, granted by a Husband to his Wife with the burden of his Debts, and a Provision that they shall be affected with the same, That the property of the Goods is settled in the person of the Wife; so that she may dispose of the same: And these who acquire Right thereto are not concerned to enquire,



quire, whether the price be converted to the use and satisfaction of the Creditors; who will have a personal Action against the Wife: So that she will in effect be in the case of an Executor and Trustee: But if the Goods so affected be extant, the Creditors of the Husband will be preferable to the Wives proper Creditors; her Right being fiduciary (as said is) and to the use foresaid. *Præsentia. Vide supra 9. Decem. 1675.* The Creditors of James Mastertoun.

D. 321.

contra

21. Decem. 1675.

**A** Father having made a Disposition in favours of his Son, reserving his own Liferent, with power likeways to dispose of what he had provided; did appoint certain Persons as Curators, and to have Administration of what he had provided, during not only the Pupillarity, but the Minority of his Son; and nevertheless his Son, having chosen Curators after his Pupillarity, there was a Competition betwixt the said Curators, and the Person appointed by the Father to Administrate.

*The Lords Found*, That the Son, as to his Person, was not *in potestate* of either of the said competing Curators; seeing *Curator non datur personæ sed rebus*: and as to any other Estate, belonging to the Minor, any other way than by the Provision of his Father, the same was to be governed by the advice of the Curator, named and chosen by himself.

But the Lords demurred as to that Question, *viz.* Whether the Father might affect the Right granted by himself, with the Quality and Provision foresaid, that the Person named by him, should have administration of the Estate disposed by him: And some were of the Opinion, that there is a difference betwixt a Stranger and a Father; in respect Strangers are not obliged to give; and what they are pleased to give, they may affect and qualify their Right thereof *sub modo*, and with what Provisions they think fit; whereas a Father has a Duty lying upon him in nature, to provide his Children; and by the Law he may name Tutors to his Children; but after Pupillarity, he cannot put them under the power of Curators, without their own consent: and if this practice should be allowed, there should hereafter be no election of Curators: They did also consider, that the Right granted by the Father, was in effect *donatio mortis causa*, seeing the Father retained possession, and a power to revoke: And it seemed, that as the Father could not in Testament make Curators, so he could not do the same by a Legacy, or any such Donation *mortis causa*.

D. 322. Mr. of Rae contra Dumbyth. 8 February 1676.

**I**N a Spuilzie, at the Instance of the Master of Rae against Dumbyth, *It was Alledged*, The Pursute was prescribed, because not intended within 3. Years; so that it could not be sustained to give the Pursuer *Juramentum in litem* and violent Profits. *It was Replied* for the Pursuer, That long within the 3. Years, a pursute for Depredation had been intended, before the *Justice*; Which being of a Higher Nature, and including Virtually, and in consequence, the conclusion of Restitution and Profits, was a sufficient Interruption as to this pursute.

*The Lords*, notwithstanding *Found*, the pursute prescribed. *Newbyth Reporter.* Mr. Thomas Hay Clerk.

D. 323.

D. 323. *Riccarton Drummond* contra *ead. die.*

**T**HE Lords Found, That a special Service in an Annualrent, doth give Right to Heretable Bonds, and all other Heretable Estate, whereupon Infestment did not follow; and includes a General Retour, as *Homo* doth include *Animal*. *Newbyth* Reporter. *Hamilton* Clerk.

D. 324. contra *ead. die.*

**T**HE Lords Found, That when Creditors did compear in Adjudications, not being called; they ought to be admitted with that quality, that since the courle of the Adjudger is stopt by their Compearance, the Adjudger shall be in the same case as to any Adjudication at their instance, as if both Adjudications were within year and day.

D. 325. Colledge of *Aberdeen* contra *ead. die.*

**T**HE Colledge of *Aberdeen*, having Right by Act of Parliament, to the Vacant Stipends within the Bounds thereinmentioned; pursues for a Vacant Stipend: the Bishop of *Ross* compeared and alledged, That the Kirk was his Mensal Kirk, so that there could be no Vacant Stipend.

*The Lords Found*, That the Colledge should have Right to any Stipend that belonged to the former Ministers, either modified to them, or of which they have been in Possession: and that it was consistent, that the Kirk should be Mensal, and yet the Minister should have a Stipend, and that the Pursuers should have Right thereto, being Vacant. *Craigie* Reporter.

D. 326. contra 9. February 1676.

**I**N a Suspension, a Reason of Compensation is lybelled, *viz.* That the Charger was debtor to the Suspender upon account of a Fraught; and it was offered to be proven by the Chargers Oath, that he was so Debitor; and by Witnesses what the Fraught extended to

*The Lords Found* the Letters orderly proceeded; and that Compensation was *de liquido in liquidum*, and not *de liquidando* by Witnesses.

D. 327. contra *ead. die.*

**A** Pursute was intended for a Sum of Money, which the Defender was obliged by his Promise to pay, in case he should be married; having gotten from the Pursuer in the mean time a Piece, which the Pursuer was to loose, in case the Defender should not be married.

*The Lords* sustained the Pursute: Tho some of their Number were of the opinion, that *sponsiones ludicra*, of the Nature forelaid, ought not to be allowed. *Strathurd* Reporter.

D. 328. Sir *Patrick Nisbet* contra *Hamilton*. *ead. die.*

**A**fter the Lands of a Debitor were denounced to be compryfed; a voluntar Right was granted by him, of an Annualrent out of the samen  
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Lands, for an Onerous Cause; whereupon the Annualrenter was infest by a publick Infestment, before any Infestment upon the Comprising: and there being upon the foresaid Rights a Competition betwixt the Compriser and the Annualrenter: *It was Alledged*, That after the Lands were denounced, the Debtor could not give a voluntar Right of the same being litigious, and affected with the Denunciation: And on the other part, it was debated, that the Debtor, not being inhibite, might give a voluntar Right for an Onerous Cause, and the first consummate Right ought to be preferred.

*The Lords*, In respect it was pretended there were contrary Decisions, *Thought fitt*, not to give Answer, until these should be considered.

D. 329. *Park contra Ryfly. eod. die.*

**A**Tennent having sold Nine Score of Sheep, and the famen being carryed off the Roum where he was Tennent; the Master of the Ground, by Warrant of the Sheriff, as having therein the Right and Interest of a tacite Hypotheck, did seise upon the same.

*The Lords Found*, That neither the Master nor the Sheriff, without citing the Partie, could seise upon the said Goods, not being upon the Masters Ground; nor give Warrant to that purpose: And yerseing *quævis causa excusat a spolio*, they restricted the Pursute to wrongous Intromission: and allowed to the Master his Defence for Retention of the Goods, until he should be payed of his Years Duty. *Newbyth Reporter. Hamilton Clerk.*

D. 330. *contra eod. die.*

**T**HE Right of a Wadset being comprised, the Compriser did require for the Sum due upon the Wadset; and pursued the Representatives of the Debtor: *It was Alledged*, for the Defender, That he could not pay the Money, unless the Pursuer should put the Defender in Possession of the Lands: *It was Answered*, That the Pursuer not having possession himself, and having loosed the Wadset by Requisition, he could not put the Defender in possession: and the Defender might have taken possession by his own Right: and it was enough that he was content to renounce the Wadset; especially seing neither the Pursuer nor his Author had done any Deed to put the Defenders in worse case as to Possession; and the Possession was apprehended and still continued by an Anterior Compriser: and the Pursuer had obtained a Declarator, finding the said Comprising to be satisfied and extinct, so that the Defenders might easily recover Possession.

*The Lords* notwithstanding *Found* the Alledgeance Relevant, and that the Pursuers should put the Defenders in possession.

D. 331. *Grant contray Barclay. 10. February 1676.*

**I**N a pursute upon a Passive Title of Behaving; *It was Alledged*, that before intention of the cause the Defender had gotten a Gift of the Defuncts Escheat.

*The Lords*, Upon Debate amongst themselves, *Found*, that albeit the Gift was not declared, yet it purged the Defenders vitious Intromission; being before the intention of the Cause; and that the Defender, having the Goods in his hands, needed not a Declarator.

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This seemed hard to some of the *Lords*, In respect by our Custom there being two wayes *adeundi hereditatem*, viz. either by a Service or by Intromission was the Defuncts Goods that were in his possession: The Apperand Heir, by medling with the Goods, *gerit se pro hærede*; And to by his Intromission having declared his intention alie fully as if he were served Heir; *semel hæres* cannot cease to be Heir; there being *Jus quæsitum* to the Creditors as to a Passive Title against him. 2. The pretence, that the Defender is in the same case, as if there were an Executor confirmed before the intention of the Cause, is of no weight; Seing the Defence upon the confirmation is sustained; because there is a person against whom the Creditors may have Action, which is not in the Case of a Donator. 3. A Donator has no Right without a general Declarator; And tho, when the Donator has the Goods in his hand, there needs not a special Declarator; yet, for declaring his Right, there must be a general one. 4. As to that pretence, that the Defender cannot be Lyable as Intrometter with the Defuncts Goods, because they belong to the Fisk and not to him; *It is Answered*, That the Goods being in the possession of the Defunct; the Apperand Heir thereafter medleing with the same *eo ipso adit*; and the Creditors ought not to be put to debate, being he is in Possession: And if a person should be served special Heir to the Defunct, tho the Defuncts Right were reduced and the *Hæreditas* could be *inanis* as to the benefite, yet the Heir would be still Lyable. Mr. *Thomas Hay Clerk*.

D. 332. *Mcquail contra Mcmillan. eod. die.*

A Pursute being intended against the Wife as universal Intrometter to a Defunct, and her Husband *pro interesse*; and the Wife having deceased: It was *Found*, that the Husband should not Lyable, unless it were proven, that he had Intromission with the same Goods; upon the Intromission with which the former pursute was intended against his Wife.

This was not without difficulty: And upon debate amongst the *Lords*, tho it was not the present case, yet the *Lords* enclined to be of the Opinion, that the Husband, having gotten a Tocher *ad sustinenda onera Matrimonij*; If the Wife had any other Estate, whereunto the Husband had Right *Jure Mariti*, he should Lyable *in quantum locupletior*. *Nevoy Reporter. Robert Hamilton Clerk.*

D. 333. *Alexander Abernethie contra Arthur Forbes. eod. die.*

THE Lord *Saltoun* having given a Bond of 20000 *Merks* to *Alexander Abernathie*, upon account of his Service, and of the Service done by his Brother *James Abernathie*: Thereafter the said Lord *Saltoun* did grant a Bond, making mention that the Lands of *Auchincleuch* belonged to him and his Authors, and that the said *Alexander* had been Instrumental to obtain a Reduction of the Rights of the Estate of *Saltoun*, to the behoof of the said Lord *Saltoun*; and therefore obligeing my Lord *Saltoun* to Infeft him in the said Lands.

The *Lords Found*, That the said Bond, being after the former and for the Causes foresaid, and having no Relation to the said former Bond of

20000 *Merks*, that it should be in satisfaction of the same; Could not be interpreted to be in satisfaction thereof: And the Brockard *Debitor non præsūmitur donare* does not militate in this Case; Seing the Lord *Salton* was in a capacity to give both the said Bonds, by way of Donation: and the question was not betwixt the said *Alexander* and the Creditor, but betwixt another person to whom thereafter he had gratuitously Disposed his Estate. *In præsentia.*

D. 334. *Gibson contra Fife.* 12. February 1676.

A Woman having lent 100 *Merks*, upon a Blank Bond; and the same being lost: The Debitor was pursued for payment of the said Sum; and did confess that he had truly borrowed the Money, and granted the Bond Blank; and he was willing to pay the same, being secured against any pursuit, at the instance of any person, who might have found the said Bond, and filled up his own name therein.

The Lords thought the case to be of great difficulty and import, as to the preparative; that practice of granting Blank Bonds having become too frequent: And resolved, in this case, to take all possible Tryal by the Debtors Oath, and otherways, of the date and Writers Name and the Witnesses in the said Bond: And thereafter to ordain the Debitor to pay upon surety, that the Pursuer should relieve him of any Bond that should be found of that date and Sum; and written and Subscribed by the Writer and Witnesses that should be found to have been in the said Bond. *Gibson* Clerk.

D. 335. *Anderfson contra Lowes.* 15. February 1676.

THE Lords, in the case abovementioned *Anderfson contra Lowes* 27. November 1675. Found the Tenor of the Write therein specified proven by the Adminicles thereinmentioned. *In præsentia.*

D. 336. *Marshall contra Forrest and her Husband.*  
*eod. die.*

IN a pursuit at the instance of a Minor against his Tutrix: The Pursuer having referred to the Tutrix Oath, that she had intromitted with diverse particulars belonging to him: The Husband of the Tutrix Alledged, that she could not declare in his prejudice: *It was Replied*, That the Pursuer having an Action and *Jus quesitum* competent to him against his Tutrix, he could not be in worse case as to *modum probandi*, by the Tutrix her superinduceing a Husband: And that the Intromission of a Relict, after her Husbands decease, being such as to Money, Bonds, and many other particulars, as could not be known to any person, but to her self; nor proven, but by her own Oath; It were hard, that the Minor should be prejudged of his Probation by her own Deed: And the Husband is not in the case where a Debt is only to be constitute by the Wifes Oath; seing the Ground of the Debt is constitute by Write, *viz.* By the Nomination or Letter or Tutorship: And when there is a pursuit against any person, that Person cannot by an Assignment prejudice his Creditor of his Probation by Oath; and the Minor is more privileged; seing by the Com-

Common Law Minors have a *tacite hypothec* of their Tutors Estate; and by our Law they ought to be favoured, at least so far as it should not be in the power of the Tutrix to ruine them, by convoleing *ad secundas nuptias ante redditas rationes*.

The Lords thought the case considerable: And Ordained the Tutrix to declare; Reserving to themselves, to consider what her Declaration should import. *Forret Reporter. Gibson Clerk.*

D. 337. E. of *Dumfermling* contra the Earl of *Callender*.  
16 February 1676.

THE Earl of *Dumfermling*, having Right by Assignment, to the Obligements contained in the Contract of Marriage, betwixt the deceased Earl of *Callender* and his Grand-mother; in swa far as the same is in favours of the said Lady: pursued the said Earl of *Callender* for Imple- ment of the said Obligements; and the Lord *Almond*, now Earl of *Callender*, as having gotten a Right to the said Earl of *Callender*'s Estate, with the burden of his Debts: and the said Earl in the *interim* having deceased, did insist against this Earl of *Callender*: For whom *It was Alledged*, That the Process ought to be transferred against some representing the said Earl of *Callender*, as Heir of Line, or otherways: And tho the Pursuers Procurators declared, they insisted only against *Callender* for a Declarator, that the Estate disposed to him should be affected with the foresaid Oblige- ment: *It was urged for Callender*, That the said Earl's Heirs ought to be called; Seing the Declarator, against him being a singular Successor, that his Lands should be affected, was only a subsidiarie Conclusion, and could not be sustained before the Debt was constitute: and the Debt could not be constitute, unless the pretended Debtor, or some representing him, were called.

The Lords notwithstanding Found Process; and that there were no ne- cessity of calling or transferring against the Heirs of the Debtor. Actor *Sinclair, Bernie* and others, alteri *Lockheart. Monro Clerk. In Presen- tia.*

D. 338. Doctor *Borthuick* contra the Earl of *Crawford*.  
*eod. die.*

THE Earl of *Crawford*, having borrowed 8000 *merks* from the Mo- ther and Grand-mother, and two of their Children, for them- selves and in name and behalf of their said Children; he is obliged by his Bond to infect the said Mother and Grand-mother in Liferent and the said Children in Fee in an Annualrent out of certain Lands; but by a mistake, the Precept of Seisin, contained in the Bond, is in favours only of the Mother and Grand-mother, and for infecting them as Fiars of the said An- nualrent, and accordingly they are infect: And yet thereafter the said Mo- ther and Grand-mother acknowledging, that the said Infeftment was so taken upon mistake, did by a Disposition, bearing the Narrative foresaid, dispo- ne the Fee in favours of the said Children: and there was a Pursute intended at their instance, against the said Earl of *Crawford*, for pointing of the Ground, Wherein *It was Alledged*, That the Mother and Grand-  
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mother, being only Lifrenters, could not resign the Fee, which they had not: and if the Pursuers made use of their Right from them, the Defenders ought to be affoizied; because the Mother and Grand-mother, by a Transaction betwixt the said Earl of *Crawfurd* and them, had accepted the time of the *Englisbes*, a parcel of Lands in satisfaction of the said Debt.

*The Lords Found*, notwithstanding of the said Alledgance, that the Pursuers ought to have process for pointing the Ground; In respect the Mother and Grand-mother had *de facto* the Fie in their person upon the said Precept and Seasin: And the same being given *indebite*, as said is, they might have been compelled to denude themselves thereof: and therefore might voluntarily, and accordingly did denude themselves thereof, and the said Transaction could not prejudice them, seeing they derived their Right from the said Persons *qualificate*, in respect of their Interest and Error fore-said; and they might have been compelled to give the same: and the Earl of *Crawfurd* was not *in bona fide* to contract with them; Seeing by the Bond granted by himself, they were only Fiars, and the other but Lifrenters. Actor *Lockhart* and *Beaton*, alteri *Cunningham* and *Suinton*. Clerk *in presentia*.

D. 339. Doctor *Hay* contra *Alexander*. 17. Febr. 1676.

Doctor *Hay* his Case, 28 January 1675. *supra*, resumed and taken to consideration this day; And tho some of the Lords considered, that it was hard to canvel Certifications in Pursutes of Improbation after a long Dependence, and diverse Terms given to produce, and delays of Extracting, after Circumduction of the said Terms; and that such Certifications are not only the great Surety of these who obtain the same, but of these who obtain Right from them, conceiving themselves to be secured with such Certifications: Yet the President, and others of the Lords enclined to repon *Alexander* against the Certification, the Writes being produced; tho it was urged, that beside the Security and Interest of People, as said is, it was to be considered, that in this Case, there were Advantages pretended to on both hands, *viz.* by *Alexander* of an expired Comprising; and by the Doctor of the said Certification: and that *Alexander* and his Authors, by vertue of their Comprising, had been many years in Possession; tho there was probability the Comprising was satisfied; and it seemed to be equitable that the Doctor should have a Decreet of Removing; and should, give a Reversion to *Alexander*, limited to such a time as the Lords should find just, upon payment of what should be resting and unsatisfied by his and his Authors Intromission, if there there were any part of the Debt yet resting: But this Point was not decided, the Lords having recommended to some of their Number, to endeavour an Accommodation betwixt the Parties.

D. 340. *Abercrombie* contra *Acheson* and *Livingston*.  
eod. die.

A Taverner, after she had removed from her Masters Service, and was Married, was pursued to Compt and Reckon for Ale and Wine which the Pursuer offered to prove was layed in in his Cellars.

*The Lords Found*, That the Pursuer ought to Lybel and prove that the Debt was yet Resting: Seeing it was to be presumed, that Ser-  
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vants of that quality did Compt Weekly with their Masters; and the Pursuer would not have suffered the Defender to go out from his Service before she had Compted and made payment: And it appeared, that there had been former Decisions to that purpose. Lord Justice Clerk Reporter.

D. 341. *Dundas contra Turnbull and other Creditors to Whitehead of Park. eod. die.*

**I**N a Competition, betwixt an Infestment of Annualrent and a posterior Infestment upon a Compyring; the Lords enclined to find, that the Infestment of Annualrent was made publick by a pursute of poinding the Ground before the Infestment upon the Compyring: But, some of the Lords not being clear, the case was not decided. *Gofford Reporter.*

D. 342. *Wauch contra Jamison. eod. die.*

**D**OCTOR *Bonar*, being to go out of the Country did Dispone a Right of Lands and of an Annualrent to Mr. *John Smith* his near Relation; upon a Backbond granted by the said Mr. *John*, bearing that the said Right was granted partly in Trust, and partly for surety to the said Mr. *John* for Sums due for the time to him by *Bonar*; and of such Sums as *Smith* should advance to *Bonar*, or his Creditors: And that the said Right should be Redeemable by *Bonar* or his Sister, if she should survive him, by payment of the foresaid Sums.

Thereafter the Doctor did grant a Bond of 5000 *Merks* to the said Mr. *John Smith*, bearing no Relation as to the said surety: And bearing, as to the conception, a simple Moveable Bond to the said Mr. *John* his Heirs and Executors: And after the said Mr. *John Smith*'s decease, there being a Competition betwixt Doctor *Jamison* his Heir and the Executor, as to the said Sum of 5000. *Merks*: And the question being, whether it should be thought to be Heretable, in respect of the said surety; or Moveable, In respect of the conception of the said Bond.

The Lords did consider the case as of great moment, as to the consequence and Interest of the People; and upon debate at the Barr *in praesentia* and among themselves, they came to these Resolutions; *viz.* That it was consistent, that a Sum should be Moveable, and yet that it should be secured by an Heretable Suretie, as in the case of bygone Annualrents due upon Infestments of Annualrent; and of bygone Feu-duties or Taxations; the same being unquestionably Moveable *ex sua natura*; And yet there being a real surety for the same, and a real Action for poinding the Ground even competent to Executors: And likeways in the case of Wadsets loosed by Requisition, and bearing a provision, that, notwithstanding of Requisition, the real Right should stand unprejudged until payment; in which case the Sum would be Movable, tho still secured by Infestment. 2. That, as to these qualities of Moveable or Heretable, in relation to the Interest of Succession and Question betwixt Heirs and Executors, the design of the Creditor & *animus*, was to be considered principally: And if Debts, either by the conception, were Heretable *ab initio*, or an Heretable surety taken thereafter for Moveable Debts, as a Wadset or Compyring; It was to be presumed, that the Creditor intended to alter the quality of the Sums, and that they should belong to his Heirs: but

but if Creditors should take an Heretable surety, without any intention to alter the quality of the Debt, or that the same should ly as *bonum stabile* and fixt; the Debt continues still Moveable: As *v. g.* If a Creditor, having done exact Diligence, should take a Gift of Liferent Escheat, or Recognition, upon a Back-bond, that he should be satisfied in the first place of his Debt: Or if in a Suspension, a Disposition of the Debtors Estate should be assigned, because he cannot find Caution: Or in the case of *Bonorums*, a Disposition of an Heretable Estate should be made in favours of his Creditors: Or if a Debtor should Dispose his Estate in favours of a confident person with the burden of his Debts: In these and the like Cases, Because the Creditor does not intend, that his Money should ly as an Heretable Debt, but upon the contrary has done, and is about to doe all possible Diligence, for recovery of the same, the Debt continues still Movable, notwithstanding of the said accessory and extrinsic surety.

3. Bonds, being taken after a general Surety in the Terms foresaid, for Debts to be advanced, may be Moveable; notwithstanding of such Surety, if it appear that the Creditor intended it should be such: As if such supervenient Bonds should be taken to Executors, Excluding Heirs: Especially when such general Sureties, for Sums as are to be after-advanced, are not dispositive, but by way of Provision containing Back-bonds, and not of the Right it self, *viz.* That the Receiver of the Right should not be lyable to denude, until he get payment of the Sums that should be due to him at any time thereafter; In which case it appears, that he has not a positive Right, and Surety for the said Sum, but an Interest and exception of Retention.

The Lords in end, In the foresaid Cause, Found that the said Bond of 5000 *M.* In sua far as it should be made appear, to be made up of the Sum mentioned in the Back-bond, that was due to *Smith* at that time, should belong to the Heir an as Heretable Sum; In respect, *ab initio*, the said Surety was granted for the same: But, as to the residue of the said Sums, it should belong to the Executors as Moveable; Seing the Defunct had exprest his Intention that it should be such, by the taking the Bond, in the form and conception of a Moveable Bond. *Cuninghame* and *Kincaid* for *Wauch*, alteri *Lockheart* and *Mckenzie*. Mr. *Thomas Hay* Clerk. *in presentia*.

D. 343. *Ogilvie* contra *Buckie*. 22. February. 1676.

Improbation being proponed against a Discharge, after the same had been questioned as Null, because it wanted the Writers Name, at least he was not designed.

The Lords Found The said Write Null and not probative, unless the Pursuer should condescend upon a Writer Living; at least, if he were Dead, should produce Writes written or subscribed by him, to the effect the Pursuers may thereupon have the means of indirect probation entier. Actor. *Mckenzie* alter. *Thoirs*.

D. 344. *Ærskine* contra *Rynolds*. eod. die.

THE Lords sustained a Declarator, at the Instance of a Creditor, to hear and see it Found, That certain Sums provided by a Father to his



his Children, after the contracting of the Debt, should be lyable and subject to Execution for their Debt: and that they should be lyable themselves *in quantum lucrati*, tho there was not a Reduction intended of the said Rights upon the Act of Parliament 1621. which the Lords were moved to do, not only because they thought, that the said Declarator is a Reduction upon the matter, but the rather that the Summonds were offered to be proven by the Defenders own Oaths: and in effect, as to the most of the Sums, they were not a Subject of Reduction; seing the Debts were not all assigned to the Children; but the Bonds being blank in the Creditors Name, the Father had filled them up in the Name of the Children: and as to such as were assigned, for the most part, they were renewed in the Name of the Children; the former Bonds being given back, with Assignations to the same. *Newbyth Reporter.*

D. 345. *Hilton contra L. Chynes. 24. February 1676.*

**T**HE Lady *Cheyne* being infest in an Annualrent, upon a Right granted by her Husband: Her Seafin was questioned upon these Grounds: 1. That it was Null, in sua far as the Baillie and the Actorney in the Seafin were one Person, who could not both give and take the Seafin. And 2. The Provision was during Marriage, and after the Creditor that did compeat, his Debt; and tho it could be sustained, where there was no Contract of Marriage, for a competent Provision; yet it could not be sustained for the whole Annualrent, being exorbitant; her Husbonds Estate and Debt being considered.

*The Lords,* In respect, it did appear evidently, that it was a mistake of the Notar, that the Seafin did bear the same Person to be both Baillie and Actorney, in the Clause of Tradition; And seing by the first part of the Seafin, it was clear, that there was a distinct Actorney, who did present the Seafin to the Baillie; Did therefore encline to sustain the Seafin: but before Answer to that Point, they ordained the Parties to be heard upon the said other Alledgance: and the Relict to condescend upon her Tocher and the Rent of the Estate: and the Creditor upon the Burdens. *Newbyth Reporter.*

D. 346. *Johnston contra Cullen. eod. die.*

**A** Tack, being granted by a Husband to another Person, to the behoof of his Wife; to begin at the first Term after the Husbonds decease; was not sustained against a singular Successor: because the said Tack was but a Personal Right, not being cled with Possession: and the entry was conferred *in tempus indebitum*, to begin after the Husband was denuded. *Glendoick Reporter. Monro Clerk.*

D. 347. *Johnston contra Orchardtoun. eod. die.*

**I**N a Pursute upon a Bond of Corroboration, *It was Alledged,* That the Principal Bond ought to be produced; which was repelled, in respect, the maxim *non creditur referenti, nisi constet de relato*, holds only in the Case, where there is only a naked Relation to a Write, and not when the Write that relates thereto doth proceed to an Obligement thereupon;

T t t t t

and

and it is not only Relative but Dispositive. *Glendoick Reporter. Robert Hamilton Clerk.*

D. 348. *Burnet contra Swan. eod. die.*

**A** Seafin within Burgh being questioned, because it was not found in the Books, was sustained; In respect of the Act of Parliament, excepting such Seafins from necessity of Registration; it being to be presumed, that the Clerks do not fail to registrate the same, and if they do not book them, it ought to be imputed to them, and not to the Party. *Sir David Falconer* for the Seafin. *Alteri Season. Hay Clerk. In praesentia.*

D. 349. *contra eod. die.*

**I**N a Pursute against a Minor, *It was Alledged, Quod non tenetur placitare*, because Minor: Whereupon there did arise two Questions, viz. 1. Whether the said exception, being a Dilator, ought to be verified *instante*: As to which, *It was Found* by the Lords, That Minority, being in Fact, could not be verified *instante*. 2. It being replied, That the Defender was Major, which was offered to be proven; and a conjunct Probation being desired by the Defender; It was nevertheless *Found* by the Lords, That the alledgance of Minority being eleided by the said Reply of Majority, which only was admitted, the Pursuer ought to be allowed to prove his Reply, without Conjunct Probation to the contrary. *Sir David Falconer* Actor. *alteri Hamilton Clerk. In praesentia.*

D. 350. *Rig contra Rig. 6 June 1676.*

**T**HE Lords *Found*, as they had done formerly in another Case, that where a person of a near Relation staves for any considerable time in Family with another, as in the Case in question a Brother with a Sister; and both are Majores and of that age that they may agree, if it be so intended by either, that the one should be considered and have a Fee and satisfaction as a Servant to his Sister, or that the Sister should have satisfaction for the Aliment and Entertainment of her Brother; if they make no such Transaction, that neither the Sister can claim Aliment, nor the Brother a Fee, upon pretence that he did serve, and did good Offices to his Sister; and that it ought to be thought and presumed, that he did the same upon account of his Relation, for his Entertainment; and that she did entertain him in contemplation of the said Relation, and that he was useful. *Hay Clerk.*

D. 351. *Pittarro contra the Tennents of Redmyre. 7. June 1676.*

**T**HE Abbot of *Arbroth*, by an Ancient Charter, having sewed the Miln of *Conrveth*, in these Terms, *cum pertinen cum multuris totius parochie de Conrveth*: The Feuor of the said Miln in the Year 1597. did obtain a Decreet of the Lords of Session, against some of the Heretors of the said Parish, *in foro* as to some of the Defenders; but in absence as to others,

thers, and in special as to the Heretor of *Redmyre* being called. And now *Carnegie* Younger of *Pittaro*, having pursued, for abstracted Multures, the Heretors and Tennents of *Redmyre*; and having founded both upon the said Charter of the Miln, and the said Decreet; *It was Alledged*, That the Defenders Right bears no Astriction: And as to the said Charter, it must be understood of the Multures belonging to the *Abbot*; and of the Lands pertaining to, or holden of him; and that the Lands of *Redmyre* do not hold of the *Abbot*, but of the Laird of *Drum*, who holds the same of the King: and that the *Abbot* could not astrict any Land but his own: and as to the said Decreet, that it was a latent Decreet, in absence against the Defenders Author; and that notwithstanding thereof, the defender and his Authors, had been in Possession of Liberty, in swa far as, tho they came somerimes to the Pursuers Miln, being nearest and most convenient, and the Multure being alse easie as at any other Miln; yet the going to a Miln being *facultatis*, wherein Astriction cannot be shewn, they had used and were in Possession of the said Liberty to go to other Milns.

It appeared, that the same Defence being proponed in the foresaid Decreet 1597. for these who were compearing, was Repelled; In respect the said Charter was so Ancient, and was so expressly of the Multures of the hail Parish; And after so long a time it was not necessar to debate the *Abbots* Power to astrict the said whole Parish: And the foresaid Charter does bear, that the *Abbot* did give to the Feuer the said Miln, in the same manner, and alse freely as one *Umfridus* had the said Miln and Multures, by a Grant and Right from *K. William*: And it was presumable, that the said King, who might have thirled the said Lands holden of himself, did give the Miln and Multures.

The said Decreet likewayes 1597. did mention the Production of a Retour before the Sheriff; and the verdict of an Inquest concerning the said Multures,

The *Lords* having among themselves debated, and considered, that the said Decreet 1597, tho in absence was a valide Decreet; whereby the Defenders Author is decerned, in all time coming, his Tennents, Cotars and Successors to pay the Multure thereinmentioned: And that the said Decreet was a standing Decreet by the space of 40 years; and never questioned; there was no necessity to debate upon any other Grounds, than that the Pursuer had thereby a Right to the said Multures; Seing the Defenders did not deny, that they were in use to come to the Miln, but pretend a Liberty and use to go likeways to other Milns: And it cannot be said, that he had the said Liberty, the contrare appearing by the said Decreet which never was questioned, and now cannot be questioned being prescribed, and yet the *Lords* Assolizied fra Bygones and Services, not contained in the said Decreet.

It being Alledged that the Farm should not be thirled: The *Lords Found*, That the growing Corns being Astricted by the said Decreet, there ought to be an exception, but of Teind and Seed: And that the Tennents were Lyable for such Corns as belonged to themselves; and the Master for his Farm. *Actores Sinclair and Lermont &c.* for *Pittaro* alteri for the Defender *Lockheart and Falconer. Monro Clerk. In presentia.*



D. 352. *Stenhouse contra The Heretors of Tweedmoor.*  
eod. die.

**T**HE Laird of *Stenhouse*, his Lands being designed for a Gleb; pursued some of the Heretors within the Parish for his relief, conform to the Act of Parliament: In which case, in respect the pursute was by the space of 8. or 9. years after the Designation; And the Heretors were *in bona fide*, and did possess their own Lands, and had made *fructus suos*;

The Lords Found, That the Defenders were not Lyable to pay the Annualrent for the Sum decerned from the time of the Designation; Seing *usura debentur* only *ex pacto vel mora*. Albeit it may appear, That that Relief that is due *ex lege* is at least also effectual, as if it were *ex pacto*: And the very Notion of Relief imports that the Party should be relieved of all Damage sustained by him: And the Pursuer was prejudged, not only by the want of the value of what he was to be Relieved of, but of the Interest of it. *Gibson Clerk.*

D. 353. *Ramsay contra Zeaman. 7. June. 1676.*

**D**OCTOR *Zeaman*, By Contract of Marriage, betwixt him and *Margaret Ramsay*, was obliged to employ 10000 *lib.* to himself, and her in Liferent, and the Heirs of the Marriage: And was also obliged to employ other 20000 *lib.* to himself, and to the Heirs of the Marriage; with a Provision, that he should have power to burden the said Heirs of the Marriage with an Additional Joynture to his Wife, and the provisions of his other Children; at any time *etiam in articulo mortis*: Which Joynture and Provision is accepted by the said *Margaret*, in satisfaction of what else she could claim of Terce or Moveables. And thereafter the Doctor in his Testament, having named his Son and appearand Heir, to be his Executor and universal Legator; and having left in Legacy to his Wife the Annualrent of 3000 *Merks* by and attour her Joynture; and diverse Provisions to his other Children, and Legacies to other persons: His Relict and her present Husband pursued her own Son, as Executor to his Father, for payment of the said Legacy left to her: And it being Alledged, That the Inventar of the Testament would not extend to satisfy all the Legacies; and that there ought to be a Defalcation proportionably: *It was Answered*, That she was not to be considered as an ordinar Legator, but in effect was a Creditor; In respect of the said Provision and Power reserved to the Doctor, as said is: And that he had used the said power and faculty.

The Lords Found, That the said Addition being left to her in Legacy; she was in no better case than the other Legators; and had no preference before them out of the Executry.

Yet it is thought, That if there be not so much of the Executry as to satisfy the Relict her Legacy; the Heir will be lyable for what she wants; Seing, by the said Provision, the Heirs of the Marriage are burdened with what he should add to her Joynture *etiam in articulo mortis*: And albeit *nemo potest facere ne leges habeant locum in suo Testamento*, and no person at any

any time can reserve a Power to burden his Heirs, at such a time as in Law he is not *in legitima potestate*; yet when any person gives any thing, or makes a Provision in favours of any other person, or of his Heirs of Provision; he may give and qualify the same *sub modo*, and with what burden he pleases; and therefore the Defender, being not only Executor, but the only Heir of the Marriage, will be Lyable by the said Provision to the said Addition and Provision in favours of his Wife and Children, albeit left *in Læto*: And he cannot frustrate the same, upon pretence that he will not serve himself Heir of Provision, but Heir of Line; seeing he is the same person, and is both Heir of Line, and Heir of Provision: And if need bees, the Relict and Children, as Creditors by the said Provision contained in the Contract of Marriage and in the Testament, may get Decrees against him as charged to enter Heir of Provision; and if he renounce may adjudge the 30000 *lib.* provided to the Heirs of the Marriage. Actor *Sinclair alteri McKenzie and Zeaman. Gibson Clerk. In presentia.*

D. 354. *Irving contra Forbes. 8. June. 1676.*

**I**N the case, *Irving contra Forbes*: It was debated among the Lords, whether a person should be Lyable, as vitious Intrometter, notwithstanding that it was Replyed, that he was confirmed Executor: And Answered, That as to Superintromission, beyond what was confirmed, he was Lyable as Intrometter.

It was asserted by the President and some others, That it was the custom and daily practise, That notwithstanding of Superintromission even before the Confirmation, the Executors ought not to be Lyable, but *secundum vires*; and that a Dative *ad omnia* may be taken; yet others were positive of the Opinion, that a Person, Intrometting with more nor is confirmed, was Lyable as vitious Intrometter; Seeing it could not be denied, but he was Intrometter; and he could not plead, nor pretend to be Executor, as to what was not confirmed; and if there were no Confirmation he would without question be lyable as Intrometter; and the Confirmation ought not to put him in better case; seeing, notwithstanding of the same, as to Superintromission, he is not only Intrometter without warrand and so vitious, but is perjured; having made Faith, the time of the Confirmation, that nothing was omitted; And it is hard that a custom, contrare to the Principles of Law, and to the Opinion of *Hope* and other Lawyers, should be obruded; unless, upon a Debate *in presentia*, there be a Decision, which may be the Foundation of a Custom.

D. 355. *Burnet contra Gib. 9. June. 1676.*

**T**HE Lords, in a Spuilzie of Teinds, Pursued at the instance of *Alexander Burnet contra William Gib, Found*, That the Defender, or his Author having enclosed a peice of Marish Ground to be a Yard; and having made no other use of the same since, but for Carrets and Roots; he was not Lyable to the Bishop Titular, or his Tacksmen of the Parsonage Teinds, for payment either of the value of the Parsonage Teind, or for the Viccarage Teind; which was found by plurality of one or two Voices.

These that were for the Decision did found their Opinion upon these Grounds, *viz.* 1. That the Heretor *poteſt uti Jure ſuo*; and that the Titular has no tye, nor Servitude upon him; but he may either Labour, or not his own Ground; If he do it not in *fraudem* or *amulationem*, of purpose to prejudice the Titular. 2. That the Defender, in order to his own Interest, having thought fit to enclose his Ground, and to make use of it for Carrets and Roots, for which, by the custom of the Country, Teind is not due, neither to Parſon, nor Viccar; the Defender is not Lyable for Teind; Seing Viccarage Teind, and the payment of it is regulate, according to Custom.

It was urged by the Lords that were of an other Opinion, That the Titular of the Teinds had an *interesse partiarium* as to Teinds; so that albeit the Heretor may *uti Jure ſuo*, it is to be understood, that he should use the same *sine injuria*, without prejudice of the Titular: And if, of purpose to prejudice the Titular, he should not Labour but suffer his Lands to ly waste, he will be Lyable to the Titular for the value of the Teind that was formerly payable, or might have been gotten; As was Found in the case of the Laird of Polwart against the Minister of Polwart. For, If he should inclose all or a considerable part of his Ground that was arable Land, and whereof the Teind was either payed to, or led by the Titular, it were hard that it should be in his Power to prejudice the Parſon to the advantage of the Viccar; But in that case the small Teinds would be considered, as great and parſonage Teinds, *quia ſurrogatum ſapit naturam ſurrogati*: And far less, it ought to be in the Power of an Heretor to prejudice altogether the Titular or the Minister, who is provided out of the Teinds, as in the case in question, by enclosing Ground formerly arable, and making that use of it, that neither the Titular nor Parſon can have any benefite of Teind; It being unjust, that the Titular should be prejudged, and that the Heretor should advantage himself; and by his own Deed should free himself of Teind: And albeit, by the custom in some places, Teind is not payed for Carrets and Roots in Yards, the same being looked upon as inconsiderable; and the Bounds, where the same are Sown or planted, being small parcels of Ground, for the private use of the Heretors own Family; yet when a considerable Tract of Ground is enclosed and parked, so that the Heretor has the same if not more profite than he has of his other Laboured Ground, by selling the Roots and Fruits of the same, as about *Edinburgh*, or other great Cities where great parcels of Corn-Land are taken in, and enclosed to the use foreſaid; as by the Common Law Teind is payable, even for such Fruits and Profits; So by our Law, the Titular ought not to be prejudged: And the custom, that Teind is not payable, for Roots and such like, ought to be understood of such as grow in Yards about Houses, as ſaid is, for the proper and domestick use of Heretor or Tennent; but not where a great parcel of Ground is taken in, and destinate for profite and advantage, by Sowing, or Setting, and Selling Herbs and Roots.

D. 356. *Nairn contra Scrymger.* 13. June 1676.

IN a Suspension, at the instance of a Person who had bought Lands, upon that Reason, that the Seller who charged for the Price was obliged by the Contract to give him a perfect Progreſs, and that the Progreſs exhibited



hibited to him was defective, In swa far as, the Lands did hold of the Bishop, and the Original Right was not produced, but only a Charter of Confirmation in Anno 1611; and the Charter confirmed was not produced; and the Progress, since the Charter of Confirmation, was but late; and some of the Charters had no Seasin following upon the same; and some Seasins wanted the Warrant of Charters and Precepts: And albeit it was alledged, that the Charters would be found Registrare in the Bishops Register; that defect was not supplied thereby; seing the Bishops Register was not Authentick; and ought to have no other respect than a Register of any other Lord or Baron, of the Writes granted by them.

*The Lords Found*, That, tho much may be said upon the Progress fore-said, to defend against any Person that will pretend Right to the Lands; and to found Prescription upon them: A Buyer nevertheless was not Obliged to accept and acquiesce to the same as a sufficient Progress; seing the Buyer ought to have a Right; and Prescription with 40 Years Possession doth not amount to a Right, and there may be Replies upon Interruption: and at the best, Prescription is not a Right but *exceptio temporis*.

But the *Lords* did allow, to the Charger, a time for making out a better Progress: and *Found*, That the Suspender could not be forced to acquiesce in absolute Warrantice, which was offered in Supplement of the Progress; In respect the same is only the Ground of a Personal Action, and may become ineffectual; if the Person, obliged to Warrant, should become insolvent. Actor *Falconer*. alteri *Stewart*, &c. *Gibson* Clerk. In *praesentia*.

D. 357. *Cornelius Neilson* contra

14. June 1676.

*Cornelius Neilson* one of the present Baillies of *Edinburgh*, having had notice that a Privateer had a Ship taken by him lying at *Stonehyve*, fraughted with Dails and other Timber, Did bargain with him for a Parcel of Dails and Trees to the value of 200 *lib. sterl*; And the said person, with whom he had bargained, being found thereafter to be a Pirate, being execute and hanged at *London* as a Pirate; And the said Ship being found, with the Cargo of it, to be a free Ship belonging to His Majesties Allyes, and unjustly taken by a Pirate; Yet the said *Cornelius* had the Confidence to intent a Pursute against the Owners and their Factor, to hear and see it Found and Declared, that he had *utiliter*, in respect of their Interest, made the said Bargain; seing otherways the Pirate might and would have carried away the Ship and Cargo; or otherways, not having men in Company enough to navigate both his own and the said Ship, he might or would have burnt and destroyed the same; and the Owners ought to be lyable to refund to him what he had given, for the said Parcel of Dails, and some Anchors and Cables: And in the dispute, the said *Cornelius* Procurators did not stand to hint and insinuate, that he was not without suspicion and jealousy, that the said Person was a Pirate the time that he transacted with him; and that the said Transaction was made upon a principle of Generosity (as they called it) and Humanity, in behalf and for the Advantage of the Owners.

It was Alledged for the Defenders, That the Ship and Goods being theirs, they have *rei vindicatio* of the same, and may claim and recover the Ship and

and Goods, where ever they are; and that Pirats are of all Theives the greatest; and *res furtiva non potest usucapi*, and is *extra commercium*: And by the Law, even when Persons are in *bona fide*, and do buy stolen Goods, and could not probably know whether they were stolen, yet the Owners may claim the same, and will not be lyable to refund the Price; but in this Case the Pursuer cannot in the least pretend, that he was in *bona fide*; seing by the Law of all Nations, when Goods or Ships are taken *via facti*, by Privateers or others, they cannot break Bulk, or dispose upon Ship or Cargo, or any part thereof, and if they do, Law looks upon them as Pirates; and these who do buy, or get any of such Goods from them as *Receptatores*. And seing the Pursuer doth acknowledge that he had suspicion that the seller was a Pirate, he was in *peissima fide* to have any dealing with him: And he cannot pretend he was *negotiorum gestor*, seing *negotiorum gestio* is only in the case, where a Friend, in absence of the Party concerned, does him a good Office, *eo animo*, and upon no other account, but that his Friend should suffer no prejudice: and upon the matter *negotiorum gestor*, so circumstantiate, *contrahit*, or *quasi contrahit* with the Person *cujus negotium gerit*, which cannot be said in this case; seing the Owners were altogether unknown to the Pursuer, not only as to their Person but as to their Nation: And the Pretences foresaid of Humanity and Generosity are not presumable, the Pursuer being a Merchant, and who is known to be under the Character of a person apt enough to take the Occasion of advantageous Bargains; and having bought the said Goods at an easy rate and great undervalue, and it being evident, that he did intend only his own interest, and not that of the Owners, in swa far as, he did not buy the haill Ship and Cargo *per aversionem*, but only the parcel foresaid; And it appears by a Commission produced, that he transacted so with the Pirate, that the Ship was consigned in the hands of the persons thereinmentioned, to the effect he might have also many Dails and Timber at the low rate he had agreed for, as would extend to the said Sum of 200 *lib. st. l.* and the superplus should be compted for, not to the Owners, but to the Pirate: And when the Ship was brought ashoar, he did not give notice to any Magistrates, that it should be seised upon to be forthcoming to these who should have Interest, there being ground of suspicion, that the said person was a Pirate: And as to the Pretence and Citations adduced, that *etiam male fidei possessores* have *necessarias impensas* allowed to them; That is only in the case of Expences upon ruinous Houses, which otherways would perish, being debursed by a Person that was in possession; and without which the House could not be preserved from ruine, and in other cases of the like nature: but not in the case of Thieves, Pirats and Refetters, who cannot pretend to have Repetition of the Price paid by them; the same not being *impense* but *pretium*.

Tho some of the Lords were of Opinion, That there was no Foundation for the said Pursute; and that there was rather Ground to Censure the Pursuer as a *Receptor*; that such practices should have no Encouragement: Yet others being of Opinion, that the Pursuer was favourable, having preserved the said parcel; and a benefite arising to the Owners by his Transaction; The Lords Recommended to the Parties to settle: *Actores Cuninghame, Dalrymple, & Falconer, alteri Lockheart and Mckenzie. In presentia.*

D. 358. Doctor Frazer contra Hog. 16. June 1676.

"*IN* anno 1593. Contractu Permutationis seu Excambii (ut loquimur)  
 "celebrato inter *Georgium* Comitem *Mariscallum* & *Menonem* Hog de  
 "Blairidryn; Quia dictus *Menon* dederat & disposuerat dicto Comiti quas-  
 "dam terras villæ Piscatorum vulgo of the *Fisbertoun de Peterhead*; Et villa  
 "de *Peterhead* erecta fuerat in Burgum Baroniarum; adeo ut terris istis dicti  
 "Menonis commodè Comes carere nequiret: Et quia dictus *Menon* habe-  
 "bat Jus usufructus & Locationem ad longum tempus terrarum de  
 "Blairidryn, Ideo dictus Comes disposuerat dicto *Menoni* & suis hæredibus  
 "prædictas terras de Blairidryn; sed redimendas a dicto Comite & suis suc-  
 "cessoribus, solutione trium millium mercarum & locatione dictarum ter-  
 "rarum in Annos novemdecem post Redemptionem; pro merce-  
 "de sedecem librarum singulis Annis pro dictis terris pendi solita; ut in  
 "Contractu asseritur: Et pro implemento dicti Contractus, Charta a dicto  
 "Comite & filio ejus concessa in anno 1617. dictus *Menon* investitus & ejus  
 "hæredes, dictas terras possederant, donèc Dominus *Alexander Frazer*  
 "Archiatreus Regius, acquisito Jure Reversionis seu Retractus in dicto con-  
 "tractu & Investitura contento, *Jacobo* Hog nepote dicti *Menonis* præmo-  
 "nito (ut moris est) ut dictam summam reciperet, & prædictas terras  
 "revenderet, Actione declaratoria dictas terras vendicabat Jure Retractus,  
 "rite ut assererat redemptas.

"*Excipiebat* Reus Retractus seu Pactum de retrovendendo apud nos  
 "stricti Juris esse & specificè implendum; eo autem pacto cautum terras  
 "dictas redimendas non solum solutione dictæ summæ, sed adiectum eas  
 "esse relocandas in tempus prædictum; Locationem autem seu Assedationem  
 "nec oblatam nec depositam.

"*Replicabat* Actor Pactum illud de Relocatione injustum & usurarium  
 "& illicitum esse; terras siquidem ejus esse valoris ut merces Relocationis  
 "tantum non imaginaria sit; Colonum enim pro iis pendere aut pendere posse  
 "quotannis sexcentas minas: Et si Reo non solum dicta summa 3000 mina-  
 "rum, sed etiam locatio adeo diuturna & pro mercede adeo exili danda fo-  
 "ret; specie Locationis ipsam Proprietatem vel ejus Pretium consecutu-  
 "rum: Adhæc, Constitutione *Jacobi 2di. Parl. 6. cap. 19.* Statutum esse,  
 "in Contractibus Hypothecariis, quibus terræ alienantur sub pacto de Re-  
 "trovendendo, & Relocando post Redemptionem; Conditiones &  
 "Assedationes istas haud servandas, terris redemptis, nisi convenerit de  
 "justa mercede & pensione, saltem haud multum citra justam Firmam, ut  
 "loquimur.

"*Responderebat* Reus multum interesse inter Contractus *Mutui* & alios pu-  
 "ta *Venditionis* & *Permutationis* &c. Ubi enim pecunia sceneratur & cre-  
 "ditur, usurariæ stipulationes illicitæ sunt; & pacta alioquin licita repro-  
 "bantur, ut pacta *Legis Commissoria*; ea ratione, quod debitori obærato  
 "& inopi Creditor nihil non exprimeret; ea autem ratio in aliis Contracti-  
 "bus cessat; & in hoc casu; nec enim in eo mutuum, & consequenter  
 "nec usura nec pactum usurarium nec Debitor inops, sed Contractus Per-  
 "mutationis inter Rei avum, virum haud locupletem & Comitem præpo-  
 "tentem, cui terras suas ut sibi si non necessarias, saltem commodas fla-  
 "gitanti, nedum leges iniquiores dare: Constitutionem autem prædictam  
 "*Jacobi 2di.* in Contractibus pignoratitiis locum habere, ubi terræ Credi-

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"tori



“tori impignorantur, ut ex verbis Constitutionis liquet (when Lands are “Wadset.) In casu prædicto nec Creditum nec Pignus esse; avum  
 “suum nec pecuniam Comiti dedisse, nec repetere posse; cum dicto  
 “contractui Clausula Requisitionis (ut loquimur) non inest; nec Reus præ-  
 “dictam summam petere possit; nec Comes teneatur persolvere: avum  
 “suum permutasse terras suas cum terris de *Blairidryn*, ea lege & fatis ini-  
 “qua, ut Reo haud liceat terras avitas reluere; Cum penes Actorem extra-  
 “neum & singularem successorem facultas sit redimendi, si ea uti velit  
 “conditioni parendum; terras tempore Permutationis incultas & forte ste-  
 “riles fuisse, in Regione saltuosa & montana; si sua & parentum industria  
 “excultæ & meliores sunt, id in suum detrimentum haud retroquendum.

“Quæstio ista, Domino de *Castlehill* referente, in domum interiorem  
 “introducta; & inter Dominos disceptata; Cum de ea sententiis varia-  
 “tum, visa est altiore indaginem requirere; & coram ipsis, Partibus &  
 “Patronis vocatis, audienda. Actores *Lockheart &c.* alteri *Cuninghame*.

D. 359. *Mitchel* contra *Litlejohn*. 20. June. 1676.

**M**R. *Litlejohn* Tailziour, by Contract of Marriage with his first Wife  
 Clerk, was obliged to provide whatsoever Lands, Money  
 or other Moveable Goods he should acquire during the Marriage, to  
 himself and to the Heirs of the Marriage: And thereafter having  
 Married a Second Wife *Mitchel*, and having provided  
 her to an Annualrent, he did grant a Right to her a little before his de-  
 cease, when he was on Death-Bed as was Alledged, whereby he declared,  
 that, in consideration, that his Wife had been very dutiful, and it was not  
 reasonable, that, if the Marriage should dissolve before Year and Day, she  
 should want altogether the benefite of her Joynture; therefore he wills,  
 that thð he should de cease before Year and Day, she should have a Right  
 to the said Annualrent, as it is restricted by the said Write to less than she  
 was provided to: And that the Contract of Marriage and Infeftment  
 thereupon should be effectual *pro tanto* in the case foresaid; And is oblig-  
 ed to pay the said Annuity.

This Deed being questioned upon these Grounds. 1. That he could not  
 do any Deed in prejudice of his Heirs on Dead-bed. 2. That the Con-  
 quest being provided (as said is) to Heirs of his first Marriage, both as to  
 Lands and Moveables, he could not by the foresaid Deed, being a meer  
 Donation, prejudice the Children of the first Marriage. Upon occasion  
 of the said question, the Lords thought fit to consider, what the import of  
 such Clauses of Conquest should be understood to be; the same being so  
 frequent; And there being *hinc inde Angustie*, and difficulties on both  
 hands; seeing upon the one, it may appear hard, that a Husband should  
 be restricted by such Clauses too much; and on the other hand, that such  
 Clauses should be ineffectual, and in the power of the Husband to eva-  
 cuate them; seeing all obligements ought to be understood *cum effectu & ut*  
*operentur*: And in end it was Resolved, that the said Clause of Conquest,  
 being conceived in the terms foresaid, in favours of the Heirs of the Mar-  
 riage; the Husband doth not cease to be Fiar, so that for Onerous Causes,  
 he may dispose of whatsoever he acquires; and the Heirs of the Mar-  
 riage will be lyable to his Deeds and Obligements thereanent. 2. *It was*  
*thought*, That the Husband could do no Deed *in fraudem* of the said  
 Clauses, and of purpose to frustrate the same. 3. Tho some of the Lords  
 were

were of the Opinion, that the Husband could not dispose of the Conquest but for Onerous Causes, yet others thought, that he might dispose thereof, without fraud and for Rational Causes and Considerations; as in the case in question, upon the considerations abovementioned, in favours of a dutiful Wife; And it was so found by the Major part; albeit others thought indeed, that the Husband, notwithstanding of the foresaid Clauses, might provide a second Wife and his Children by her, out of the Conquest during the first Marriage; if he had no other Estate, and the Provisions be competent; But that in the case in question, the Deed foresaid was a Donation, which the Children of the first Marriage, being Creditors by the said Clause of Conquest, might question.

But the *Lords Found*, That if the said Deed was on Death-bed, the Defunct having not only granted an Heretable Right, but having obliged himself, his Heirs and Executors, to pay the said Sum, his Executry and Deads part would be lyable to the said Obligement; even as to Moveables acquired during the first Marriage; which may appear not to be without difficulty; seeing, as to the Conquest, during the first Marriage, there could be no Deads-part; the same being provided to the Children of the first Marriage, as said is:

Tho the Heir of the Marriage may renounce to be General Heir, and may take a course to establish the Conquest, either in his own, or in the person of an Assigney to his behoof; and so not be lyable to the Defuncts Obligement, without an Onerous Cause. Yet it is to be considered, whether, if they should be served Heirs of the Marriage, they would be lyable to the same; seeing all Heirs represent the Defunct *suo ordine*, and are *eadem persona*? Or if they be lyable only to the Defuncts Deeds and Obligements for Onerous Causes?

*Item*, If such Provisions be not in favours of the Heirs of the Marriage, but only of Bairns; Whether the Bairns will be lyable to the Defuncts Debts? And if all the Bairns will be lyable to the same as Heirs of Provision?

*It is thought*, If Infeftment follow in favours of the Father and the Bairns of the Marriage, they must be Heirs of provision to him: and that all the Bairns ( if it be not otherways provided ) will be Heirs of Provision.

But these Points did not fall under debate. *Actores Cuningham, alteri Dalrymple. Hamilton Clerk. In presentia.*

D. 360. *Galbraith contra Lesly. eod. die.*

**T**HE *Lords Found*, That a Bond being granted by two Persons conjunctly and severally, being Merchants; and for the price of Merchant Ware: the same could not be questioned upon that pretence, that one of them was Minor the time of the granting the same; It being offered to be proven, that he was then, and is since a Trafficking Merchant. *Mouro Clerk.* Sir David Falconer having reported the same, in Order to his Tryal, when he was to be admitted a Lord of the Session.

D. 361. *Irving contra Irving. 22. June 1676.*

**A**lexander Irving of Lenturk raised Suspension and Reduction against John Ross in Strathmore, and Francis Irving Brother to Drum, of a Decree

creet of Spuilzie and wrongous Intromission; upon these Grounds, that the Witnesses had declared falsely; In swa far as, being adduced by the Pursuer before the Council, they had declared they knew nothing; and in the Process before the Lords, they declared fully and positively, as to all that was Libelled. And 2. They declared upon Quantities so exorbitant, that the same do amount to the twentieth Corn; Whereas in the Countrey, where the Cornes grew, they have scarce the third Corne.

*The Lords Found*, That the Decreet, being *in foro*, could not be questioned upon any Ground; and in special upon the Testimonies of the Witnesses as false; seing there should be no end nor period of Pleas; and there being no Protestation for Reprobatores. Some of the Lords were of Opinion, that as a Decreet founded upon a false Write may be questioned, so when the same is founded upon false Testimonies, and the falsehood is evident, and may be qualified *sine altiore indagine*, the same may be likewise questioned: And the Remedy of a Reduction of Decreets *in foro*, being denied, only upon that pretence of *Competent and Omitted*, ought not to be denied in such cases; seing the Ground foresaid, that the Testimonies were false, doth arise upon the Depositions of the Witnesses; and was neither known nor competent to the Defender, who is not allowed to see nor to question *dicta testium*: And a remedie, which in Law and Reason ought to be allowed, is not taken away, because it is not protested for by a Party, who for the time did not know that there were any Ground for the same. *Newbyth Reporter. Gibson Clerk.*

D. 362.

contra Sheil.

eod. die.

**A** Comprising being deduced at the Instance of an Assigney, against the Representative of the Debitor as lawfully charged; and the Compriser upon his Infestment having intended a pursute for Mails and Duties;

*It was Alledged*, That the Cedent was debitor to the Defunct, so that the Debt due to the Defunct, did compensate the Debt due by him; and the Ground of the Comprising being satisfied, the Comprising is extinguished: Which case being Reported to the Lords, they had these Points in debate, and consideration amongst themselves. *viz.* 1. That Compensation is only of personal Debts, and of Sums of Money, *de liquido in liquidum*; but is not receivable in the case of Real Rights and Lands, and Pursutes upon the same; Seing in such processes there is no Debt craved, but the pursute is founded upon a Real Right: And some of the Lords being enclined to think, that the Alledgance is not founded upon Compensation, but upon Payment or the Equivalent, *viz.* That the Cedent *habebat intus*; and in effect, and upon the matter was satisfied, being Debitor in as much as was due to him by the Defunct: And the Lords are in use to favour Debtors, whose Lands are Comprised; and, in order to extinguish Comprisings, to sustain process for Compt and Reckoning; and declaring the same to be extinct, not only by Intromission but by Compensation: Others were of the Opinion, that tho Compensation *ipso jure minuit & tollit obligationem*, where it is proponed; yet if the same be not proponed before the Decreet, whereupon the Comprising proceeds; and when both Debts are *in finibus* of a personal Obligement; the Debt contained in the Comprising cannot be said to have been payed before the Comprising;



prying; and after the Comprising is deduced, it cannot be extinguished but either by Intromission within the Years of the Legal, or by Redemption. 2. Whatever may be pretended as to the Cedent, that he could not be in *bona fide* to compryse for a Debt due to him, having alse much in his hand as would satisfy the same, yet such pretences are not competent against the Third Person having *bona fide* comprysed; or having *Jus quesitum*; As in the case of a Horning upon a Decreet, it could not be obtruded to the Donator, that the Debt was satisfied; The Obtainer of the Decreet being Debitor to the Defender: And if this should be sustained, expired Comprising and Inseftments thereupon, being now a most ordinary surety, may be easily subverted upon pretence, that the Cedent was Debitor, in Sums equivalent, to the person, against whom the Comprising is deduced: And there is a great difference betwixt payment and satisfaction, either by actual payment of the Debt, or by Intromission with the Maills and Duties of the Lands comprysed, which is obvious and easie to be known; and betwixt the pretence of satisfaction by Compensation; seing payment is *exceptio in rem*, and extinguisheth Debts as to all effects; and Intromission is so notour, that the Buyer may and ought to take notice of the same; whereas Compensation is but *quasi solutio*, and it has never effect, until it be proponed.

That point was also in consideration with the Lords, Whether Compensation can be proponed by any person, but such as has Right to the Debt? And as to this point, there were different Opinions, and some of the Lords were of the Judgement, that any person, having interest to defend against Comprising and pursuities upon the same, might alledge they were satisfied in manner foresaid: But others were of the Opinion, that no person can pretend to compence, but he that could discharge the Debt, whereupon he would compence; and consequently must have Right to the same: And in the case in question, neither a confirmed Testament, containing the Debt due to the Defunct, nor any Right to the same was produced.

The Act of Parliament, *K. Ja. 6th. Parl. 12. Cap. 141.* Being so positive, that Compensation is only *de liquido in liquidum*, before the giving of Decreets, and never after the giving thereof; Some of the Lords were of Opinion, that tho the Defender had Right to the Debt due to the Defunct, Compensation could not be received: But some of the Lords having desired, that the advising of these points, being so considerable, should be delayed till to morrow, they were not decided. *The saurer Depute Reporter. Gibson Clerk.*

D. 363.

*Lamingtoun contra Raploch. eod. die.*

**A** Suspension being craved, Upon that reason, that the Charger had been Curator, and *ante redditas rationes* could not charge him with any Debt; *It was Answered*, That the Complainer being to be Married, he desired the Charger, and some others to be his Curators, to the effect they might authorize him to Contract; and the Charger had never intromitted.

Some of the Lords were of Opinion, That if it could be verified by the Complainers Oath, that the Charger had no Intromission; and that

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these that Intrومتted were Responfal; In which case by the Civil Law, there is no *actio tutela*, but againſt theſe who intrومتted; the others who had not Intrومتted being only Lyable in *ſubſidium*, the ſaid reaſon ſhould not be ſuſtained: But it being pretended, that, by our cuſtom, all Tutors and *Curators* are Lyable, whether they intromet or not without diſtinction; and that Pupils may take themſelves to any of them: Tho it was not made appear, that the ſaid point was ever debated or decided, yet the *Lords* Ordained the Complainer to give in a Charge againſt the Curator, and the Compt to be diſcuſt upon the Bill. *Glendowich* Reporter.

D. 364. E. Dumfermling contra Callender. June 1676.

BY Minute of Contract betwixt the deceaſt Earl of Callender, and Dam Margaret Hay Counteſs of Dumfermling, he was obliged to Infeſt the ſaid Lady in the Lands and Barony of *Livingſtoun* in Liferent and Conjunctfee; and whatſoever other Lands and Sums of Money ſhould be conqueſt during the Marriage: He is obliged likewayes, to grant ſurety of the ſame, to her in Liferent, in the ſame manner as of the former Lands: And in caſe of no Iſſue of Children, the one half of the ſaid Conqueſt to be diſpoſed upon, as the Lady ſhall think fit: And the Earl of Dumfermling having intented a Purſute as Affigney by his Father, who was Heir to the ſaid Lady his Mother, for implement of the ſaid Minute; for declaring what Lands, Sums of Money and others were conqueſt by the ſaid Earl, during the foreſaid Marriage; and for Infeſting the Purſuer in the half of the ſaid Conqueſt: It was Alledged, That the ſaid Obligement and Claufe of the Minute as to the Conqueſt, are conditional. *viz.* In caſe of no Iſſue of Children; and that the ſaid condition did not exiſt. *viz.* There being an Child procreate of the ſaid Marriage.

The *Lords* upon Debate, in *praſentia*, and among themſelves; did Find, that the ſaid Condition did exiſt, In ſwa far as, tho there were Children of the Marriage, yet there was no Children or Iſſue the time of the Diſſolution of the Marriage, by the Deceaſe of the Lady.

Albeit It was urged, That theſe Conditions, *ſi liberi non extiterint, vel non ſint procreati*; and that Condition, *ſi non ſint liberi ſuperſtites*, were different in Law; and in the conception and import of the ſame: And in the firſt caſe, *ſi non ſint liberi, ſine adjecto tempore deceſſus vel diſſoluti Matrimonii, deſicit ipſo momento* that there is a Child; And the Condition, being in the Terms foreſaid, in caſe of no Iſſue, both in Law and in Propriety of Speech, cannot be otherwayes underſtood and Interprete: And in *Claris non eſt locus conjecturae aut interpretationi*, which is only, where words are Homonymous or Ambiguous: And where a Claufe is, of it ſelf, ſuch as may be underſtood without addition; to make any, upon pretence of the intention of Parties, is not *interpretari ſed addere*; & *intentio in mente retenta nihil operatur*: And that if there had been Children of the Marriage, who had Lived to that Age, that they had been Marryed, and had had Children, who had all died before the Diſſolving of the Marriage, It could not be ſaid, without abſurdity, that there had been no Iſſue; And both in Law, and by our cuſtom, when there is any Advantage given or provided by the Law, or by Contract, in favours of the Husband in caſe of Iſſue, It is ever underſtood *ſi liberi ſint procreati*, tho they do not ſurvive; As in the

the case of a Courtesy of Scotland: And that Conditions ought to be taken strictly and according to the Letter; especially in this case, the Provision foresaid, that the Lady, in case of no Issue, should have either a Fee, or the half of the Conquest; or a Faculty to dispose of the same.

It was farther *Alledged*, That the said Clause doth not import, that the Lady should have the Fee, or the half of the Conquest, but only a personal Faculty and Power to dispose of the half of the Conquest; which she had not used: And nevertheless it was *Found* by plurality, that the said Provision imported a Fee; In respect the said Minute was a short paper, drawn by my Lord Callender himself, who was altogether ignorant of the stile and conception of Writes; And, if it had been extended, as it was intended, it could not otherways be extended, but the Fee behooved to be provided to the Lady, as the half of the Conquest, And, that the half of the Conquest should be disposed of by the Lady, did import, that she should have a Fee and *Dominium*; the very nature and essence of Property consisting in *potestate Disponendi*.

Some of the Lords were of Opinion, that the said Clause did import only a personal Faculty: Upon these Considerations. 1. That the Right of *Dominium*, being the highest Right and Interest can be given, it cannot be thought to be given, but when the words are such, as are not applicable to any other interest; whereas the said words do quadrate also well, if not more, to a Personal Faculty, than to an Heretable Fee. 2. The said Clause is conceived *per verba maxime personalia, viz.* That the half of the Conquest should be disposed by her; and if she should think fit, which are *verba arbitrii & facultatis*. 3. *In dubiis minimum* is to be understood & *solitum*; & *ut evitetur absurdum*; And Respect is to be had to the quality of the Person; And albeit mean Persons, in their Contracts of Marriage, do sometimes provide, that the Longest liver may have all, It is not usual nor can be instanced, that ever, in a Contract of Persons of quality, a Fee was provided to a Wife; It being the great design, of the Marriage of such Persons, to raise a Family to the Husband; and it being very ordinary, that a personal Faculty should be given to the Wife. 4. If the Contract had been extended, it might, and ought to have been extended in these Terms, That the Lady should Liferent the haill Conquest; and, in case of no Issue, she should have the Personal Faculty foresaid: And tho the Conquest had been provided to the Husband and her, and the Longest liver of them two, and the Heirs of the Marriage, whilks faizieing the one half to his Heirs, and the other to hers; her Husband would have been Fiar; and, in the case foresaid, her Heirs would have been Heirs of Provision to him, as to the half of the Conquest. *Actores Sinclair, Bernie, &c. alteri Lockheart, &c.*

D. 365. Doctor Wallace contra Symson. June 1676.

A Bill of Exchange being drawn by a Merchant in Edinburgh, upon his Correspondent at London, payable to a Merchant at Bristol; the person, to whom the said Bill was payable, was not in England for the time, but had gone to Ireland; but his Friend, having broken up the Letter direct to him, and having *Found* enclosed the said Bill of Exchange, did indorse the same to be payed to another person upon the place; who did accor-



accordingly present the said Bill to the Merchant, on whom it was drawn; who did accept the same conditionally, when it should be right indorsed: And thereafter, the person, to whom the said Bill was payable, having duely indorsed the same to be payed, as the Indorsation did bear; The Mercant, upon whom the said Bill was drawn, did in the *interim* break, before the Bill swa Indorsed was presented to him; There having interveened betwixt the date of the Bill, which was *2d. January*, and the Right Indorsement of the same, which was about the end of *April*, about 4. Moneths; So that the Question was, whether the Drawer of the said Bill should be Lyable to Refound the Sum thereincontained?

*It was Alledged*, That he could not be Lyable, In respect the said Bill was not returned to him protested, either for not Acceptance or for not Payment: And albeit in Law, and by the custom of Merchants, the Drawer be Lyable unless the Bill be payed; yet that is ever understood with a *Proviso*, that Diligence should be done, and *Protests* should be taken; unless the Person, upon whom the Bill had been drawn, had been evidently *non solvent* the time of drawing the said Bill; which could not be Alledged in this case, seing the Defender had drawn upon the same person after the said Bill, to the value of 2000 *lib. sterling*, which had been Answered: And had likeways Answered Bills of his, of great value; whereas if the Bill in Question had been returned Protested, he would have retained the Provision he had in his Hand, or done Diligence, to recover the value of the said Bill; or might have countermanded the said Bill, and given an other Bill payable to a person that was upon the place.

The Lords notwithstanding *Found*, That the Defender and Drawer of the said Bill should be Lyable: But some of the Lords were of another Judgement: And the Defender Repined, and gave in a Bill, desiring to be Heard.

D. 366.

contra

4. July 1676.

**I**N a Suspension against an Assigney, upon a Reason of Compensation, *viz.* That the Suspender had Right to the equivalent Sum due by the Cedent, by an Assignment prior to the Assignment granted by the Cedent to the Charger.

*It was Answered*, That the Assignment, granted to the Charger, was intimate, before the Intimation of the Assignment granted to the Suspender: Whereunto *It was Replied*, That *ipso momento*, that the Suspender got the Assignment foresaid, being thereby Creditor to the Cedent, he had a Ground of Compensation against the Cedent, and consequently against the Charger as Assigney: And an Assignment, without Intimation, is a sufficient Right, and Ground of Compensation; unless there were an other Assigney to the same Sum, competing upon that Ground, that he had a better Right by an Assignment intimate.

The Lords notwithstanding did not allow Compensation, and *Found* the Letters orderly proceeded. *Newbyth* Reporter, Mr. Thomas Hay Clerk.

D. 367.

D. 367. *Buchanan contra Logie. eod. die.*

**T**HE Lords Found, That a person out of the Country, being cited at the Mercat-Cross of *Edinburgh*, and Pear and Shoar of *Leith*, upon 60. Dayes warning, to be holden as confest; tho he was not cited personally, and that the Decreet could not be questioned upon that Ground as Null: But if he were Living and desired to be repone to his Oath, there might be Ground to Repone him. *Newbyth* Reporter. Mr. *John Hay* Clerk.

D. 368. *Lefly contra Fletcher. 5. July 1676.*

**S**IR *John Fletcher* being obliged, by Contract of Marriage, to provide *Dam Marion Lefly* his Wife of a second Marriage, to the Liferent of a Sum of 10000 *lib.* did thereafter Infeft her in the Lands of *Gilchristoun*, being of more value and of a greater Rent: Whereupon she having obtained a Decreet against the Tennents; The Lords Found her Right, being granted *stante Matrimonio*, and thereafter revoked, Null; In swa far as it exceeded the Provision in her Contract of Marriage: And sustained her Decreet only effeirand thereto; and ordained her to be Lyable for the superplus, until the said Sum of 10000 *lib.* should be employed for her Liferent, conform to her Contract of Marriage. *Forret* Reporter. Mr. *Thomas Hay* Clerk.

D. 369. *Chiesly contra Edgar of Wadderly. eod. die.*

**E**DGAR of *Wadderly* being Charged, upon an Indenture betwixt him and *Samuel Chiesly* Chirurgeon, for payment of the Sum therein contained, for his Brothers Prentice-fee, and Entertainment dureing his Prenticeship: And having Suspended the said Bond, and intended a Reduction thereof upon Minority and Lefion; The Lords Found, That the Second Brother having no other Means nor Provision; his Eldest Brother, who was Heir to his Father, and had the Estate, ought to Entertain him, and to put him to a Calling: And did not sustain the Reason of Lefion. *Forret* Reporter. *Gibson* Clerk.

D. 370. *Pitrichie contra Geight. eod. die.*

**S**IR *Richard Maitland* of *Pitrichie* having obtained a Gift of Recognition of the Estate of *Geight*; There was thereafter a Minute, betwixt him and his Father, and the Laird of *Geight*; whereby it was agreed, that *Pitrichie*, who, and his Predecessors had an ancient Wadset of the Lands of *Achincreive* and others, being a part of the said Barony; should have the Reversion Discharged by *Geight*; and that *Geight* should give him a new Right of the said Wadset-Lands, irredeemable and holden of the King; and should pay to *Pitrichie* for the Charges in obtaining and declaring of the said Gift 4000 *Marks*: And that, on the other part, *Pitrichie* should Dispose to *Geight* the rest of the Estate, and the Right he had thereto by the said Recognition.

Thereafter *Pitrichie*, having intended Declarator, for Nullity of the said Minute; upon pretence that *Geight* did refuse and fail to perform his part;

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did obtain a Decreet, and did enter into a Bargain with the Earl of *Aboyne*, and did dispone to him a considerable part of the said Estate; that by his Power and Interest in the Countrey, he might be maintained, and be able to enjoy the rest: But, before the granting of the said Right to *Aboyne*, *Geight* had intented a Reduction of the said Decreet of Nullity; upon that Reason, That the said Decreet was given, In respect he had not the Writes at that time in hand to produce; and to instruct, that he was able to give a Right of the said Wadset-lands to be holden of the King; and that they were now found upon search of the Registers; So that he had not been *in mora*; and the not production of the said Writes ought not to be imputed to him, but to the Confusion of the Times; his Writes being scattered, and his Father having been long time a Sufferer and Prisoner, for serving the King.

*The Lords Found*, That the said Decreet, being in effect upon a Certification for not Production, and *Geight* condescending, and offering to instruct, that he had not been negligent, and the occasion and manner that the said Writes were not in his Hand; and how he had recovered the same; he ought to be reponed against the same: And that, by the Reduction, before the granting of the Right to *Aboyne*, it was *res litigiosa*, and *Aboyne* ought to be in no better case than *Pitrichie*.

D. 371.

contra

eod. die.

**A** Bond, granted by a Woman *stante matrimonio*, for payment of a Sum of Money, being ratified judicially; *It was Found*, That the Ratification did not bind her: being of a Deed null in Law, tho it was judicial; being likeways *stante matrimonio*.

D. 372. *Blair of Kinfauns contra Mr. Thomas Foulcr.*

6. July. 1676.

**I**N the Case betwixt Sir *William Blair of Kinfaunes* and *Mr. Thomas Foulcr*, *It was Found*, That an Action, at the instance of the Executors of a Minister, for building a Manss, and refunding the Expences of the same, is competent against the Heritors for the time and their Representatives; but not against a singular Successor: and that it is not *Debitum fundi*. *Newbyth Reporter. Gibson Clerk.*

D. 373.

*Rynold contra Erskines. eod. die.*

**T**HE Lords Found, That, a Father having assigned certain Bonds for provision of his Children, the Creditors have not only an Action of Reduction competent to them, but a personal Action to refund the Sums uplifted, upon the Bonds, if the Assignment should be found to be fraudulent: But did Reserve to the Defenders to debate, whether the same was fraudulent; The Defenders having Alledged, that the same were granted by their Father, having a plentiful Fortune for the time, so that he might lawfully provide his Children. *Newbyth Reporter.*

D. 374



D. 374.

*Crauford contra Gordon. eod. die.*

**I**N the Case, *Alexander Crauford contra Sir Lodovick Gordon*, The Lords thought the point in question. *viz.* Whether or not, a Backbond being granted by the Compyrser, the time that he did receive an Assignment, whereupon he Compyrised; or by a person having gotten a Disposition, did affect the said Rights, not only as to the Granters of such Backbonds, and their Representatives, but likewise as to Singular Successors; And if the same should be Found to affect, if it did affect only while the said Right was personal, and before Infeftment, but not after?

The Lords thought the said point, to be of that importance as to the Consequence and Interest of the People, that it was recommended, that they should have their thoughts thereupon, to the effect that the same may be decided with great consideration; And accordingly, this day, the case being fully debated among themselves, It was carryed and found by plurality of Votes, That such Back-bonds do affect, even as to a Singular Successor, tho *extra corpus Juris*; And albeit they be granted after the receiving of such Rights: And that they affect Compyrsings, even after Infeftments has followed thereupon, during the Legal, but not after. Diverse of the Lords did Argue and Vote against the said Decision, and in special, *A. I. C. N. B. S. T.* Upon these Grounds. 1. A Singular Successor does not succeed, *in universum Jus* as an Heir, but only *in Jus Singulare*; And if the said *Jus* be simple and pure, without any quality *in corpore Juris*; any extrinseck quality or Deed may bind the Granter and his Heirs, but not the Singular Successor, who neither can, nor is obliged to know, and take notice of any quality that is not in the Right. 2. The quality of a Right is an Accident of the same, and *Accidentis esse est inesse*; So that, in Law, where the same is not *in corpore Juris*, it doth not affect the Right as to Singular Successors. 3. Upon the Considerations foresaid, Reversions, and Bonds for Granting Reversions, do not militate against a Singular Successor, unless they be *in corpore Juris*, or Registrate; And tho there be an expresse Statute to that purpose, yet it doth not follow a *contrario*, where there is no Statute, Back-bonds should affect; seeing the said Statute is made, conform to the Common Law, and is Declaratory as to Reversions; being then most in contemplation of the Parliament, but doth not derogate from the Common Law in other Cases. 4. Back-bonds are upon the matter Reversions and do oblige only to make a Retrocession in favours of the Cedent; and cannot operate more, than if a formal Retrocession were made in favours of the Cedent; which could not prejudice a Singular Successor, unless it were intimate. 5. It would be an irreparable prejudice to the People, and to Singular Successors, who, finding a Right pure without any quality are *in bona fide* to think, that they may securely take a Right thereto; And yet should have no remedy, if, upon pretence of Back-bonds, and Deeds altogether extrinseck, their Right may be questioned. 6. As to the pretence of the prejudice to the People, *viz.* That they are in use to grant Assignations, in order to the deduceing of Compyrsings thereupon; and may be frustrate, if the Back-bond should not affect the same, is of no weight; Seeing they trust the Assignees; And it is their own fault, if they

they Trust persons that do not deserve Trust; And they have a Remedy by intimateing the Back-bonds, which, upon the matter are Translations; whereas a Singular Successor has none. 7. That such Back-bonds should affect Compyrings, not only before, but after Infestment during the Legal; But thereafter should cease to qualify the same; It seems to be inconsistent with, and against the principles of Law. *In presentia.*

D. 375.

contra

eod. die.

**T**HE Lords Found, That a Bishop and Executors, had Right only to the Quots of such Testaments, as were confirmed in the Bishops time, in his own Right, as Bishop for the time: And the said Quots, being in effect Sentence-Silver, *dies cedit* by the Confirmation; so that who-soever is Bishop then, has Right to the same.

They Foundlikeways, That Quots being a part of the Bishops Patrimony and Rent; The Quots, of all Testaments confirmed within the half Year, after the Bishops decease, did fall under the *Ann*, and belong to the Bishops Relict and Executors. *Vide Carpozovium. lib. 1. Jurisp. Consistorialis de Salario defuncti Pastoris semestri.*

D. 376.

Spence contra Scot

7. July. 1676.

**I**N a pursute for payment of a Sum of Money, *It was Alledged*, That the Pursuers Cedent was Tutor to the Defender, and had not made his Accompt: Which Defence the Lords sustained against the Assigney; But it was their meaning, that the Pursuer should not be delayed; and and that a competent time should be given to the Defender to pursue and discuss his Tutor. *Glendoich Reporter. Mr. John Hay Clerk.*

D. 377.

Johnstoun contra Rome. 8. July. 1676.

**I**N a pursute upon the passive Title of *Successor Titulo Lucrativo*; In swa far as the Defender had a Disposition from his Father, without an Onerous Cause: The Lords sustained the pursute, albeit it was Alledged by the Defender, he had made no use of the said Disposition, and was content to renounce the same; which the Lords Found he could not do, being delivered to him. *A Concluded Cause Advised. Mr. Thomas Hay Clerk.*

D. 378.

Finlaw contra Little. 11. July 1676.

**A** Legacy being left in these Terms, *viz.* That it should be payed out of the Testatrix her Household Plenishing, and Debts due upon Compts: The Lords Found, That albeit the said plenishing, and Debts should not extend to satisfy the said Legacy, that it was not a limited Legacy; but ought to be satisfied out of the other Executry; and that the saids words were only *executiva*, as to the order and way of Payment in the first place; and *Interpretatio* should be *ut actus valeat*; especially seing the Legator was the Defuncts Relation: And it is to be presumed, that the foresaid qualification was only as to the way of payment; In respect the Defunct did look upon her Plenishing and Debts foresaid, as sufficient

sufficient to pay the same; And did not declare that the said Legacy should be only payed out of the same, and in case it should be short, that she should have no more: And it appeared to the Lords, that the Executors had given up a very inconsiderable Inventar of the plenishing, and far short of what a person of the Defuncts condition and profession, being a great Innkeeper, behoved to have in order to her Calling. *Actores Dalrymple &c. alteri Hog. in presentia.*

D. 379. Bishop of Dumblain contra Kinloch of Gilmertoun. *eod. die.*

**I**N Anno 1620. His Majesties Grand-Father did Annex the Deanry of the Chappel Royal to the Bishoprick of Dumblain: And did mortify thereto an Annualrent of Ten Chalders of Victual out of the Lands of Markle and Traprane: By vertue of which Right the Bishops of Dumblane, have ever since posselt the said Annualrent, until 1638. that the Bishops were suppress: And thereafter, Mr. Alexander Henderson, and Mr. Robert Blair being provided thereto, as his Majesties Chaplaines, did continue in the possession of the same, till the Bishops were Restored in 1661. and since the Bishop of Dumblane was in possession of the same: But Francis Kinloch now Heretor, tho he had been in use of payment of 8. Chalders of Victual, as a part of the said Annuity, out of his Lands, since he acquired a Right to the same; being charged at the instance of the said Bishop, did Suspend upon that Reason, *viz.* That the said Annualrent was Wadset by the Earl of Bothwell in the Year 1587. to Mr. Thomas Craig for 7000 Merks: And John Murray Earl of Annandale having acquired the Right of the said Annualrent; and having resigned the same in favours of K. Ja. to the effect it might be Mortified, as said is; The King, by the said Mortification, could give no other Right, than what flowed from the said persons his Authors, which was redeemable, as said is; and *de facto* the said Right was Redeemed; In sua far as, the Right of Reversion of the said Annualrent having come in the person of the Duke of Lennox, Donator to the Forefaulture of the Earl of Bothwell, and from him to the Earl of Balcleugh, and from the late Earl of Balcleugh to Sir John Scot of Seatoun. *Cetera defunt.*

D. 380. Jaffray contra Murray. 8. November 1676.

**A** Party being pursued, upon the passive Titles; and in special upon that of Charged to enter Heir; and having offered to Renounce, *It was Replied* that he could not, Seing *Res* was not *integra*; In Respect he had granted a Bond, Of purpose, that thereupon the Estate might be Adjudged; The Lords Found, That albeit he had not granted the Bond upon the designe foresaid, yet, the Estate being adjudged and incumbered by his Deed, he ought to be Lyable to the Defuncts Creditors *pro tanto*, Or to purge. *Gibson Clerk.*

It is Thought, That if the Appeirand Heir should *dolose* grant a Bond, that the Defuncts Estate might be thereupon adjudged, ought to be Lyable *in solidum*: But if he grant a Bond which is a lawful Deed, and thereupon his Creditor adjudge, which he could not hinder; It is hard to sustaine a passive Title against him; unless his creditor, having ad-

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judged, were satisfied by that course; In which case, seeing the Defuncts creditors are prejudged, It is Reason he should be Lyable *pro tanto*.

D. 381. *Steuart contra Hay. 9. November. 1676.*

**L**Ands being bought after Interdiction: A Reduction of the said Interdiction was pursued at the instance of the Buyer, upon these Reasons. 1. That Interdictions, by the Common Law, are only of *prodigi*; And Interdictors are in effect given *Curatores* to them: And, by our custom, albeit Interdictions are granted *sine causa Cognitione*, upon Bonds granted by persons interdicted, upon that consideration and narrative, that they are persons facile, and not fit to manage their Estate; whereupon the Judge presumes, that they are such; and upon a Bill gives warrant to publish the same; yet the Interdiction in question ought not to be sustained, seeing it is not the ordinary stile of other Interdictions; and the Bond of Interdiction bears no narrative of Facility; but only that the Granter, for the standing of his Family, being very Ancient, did oblige himself not to Dispose his Estate without content of the Persons thereinmentioned, and Letters of Publication were not raised thereupon, but Inhibition was only used.

2. That Interdictions are a Remedy, for securing weak persons, and ought not to be a snare to others: And the Law favours, and helps these that are *decepti*, and not *decipientes*: And that the Pursuer was in effect circumvened, in so far as, the said Interdiction was not Registered till the Pursuer was in Terms of Bargaining; and they had searched the Registers, and had not found any such Interdiction; and the only Interdictor on Life, was Witness to the Bargain, and got a part of the price; and the rest of the price was payed to Creditors anterior to the Interdiction; And the Pursuer, relying upon the Ingenuity of the Disposer, tho he might have secured himself by taking a Right to the said Debts, did extinguish the same, by taking Discharges and Renunciations.

The Lords being divided in their Opinions, The case was not decided this day. *Hay Clerk. In praesentia.*

D. 382. *Inter eosdem. 10. November. 1676.*

**T**HE Lords sustained the Interdiction abovementioned, the Defenders offering to prove, that the Person Interdicted was not *rei suae providus*: And Found, That the person interdicted was thereby in the condition of Minors; And that he and his Heirs could not question any Disposition or other Deed done by him, upon the naked head of Interdiction, unless they alledge and qualify Lesion: And that the Pursuer of the Reduction may prove that the Bargain was profitably made, and that the pryce was *in rem versum*: And the Lords declared, they would not be nice as to Probation; but Reserved the consideration of it to themselves.

It was further *Replied*, That the Interdiction is Null, being Exesute by a person that was not a Messenger, being deprived; which was Repelled, In respect of the Answer, that it was offered to be proven, that notwithstanding of the Sentence of Deprivation, he was holden and *tentus & reputatus* to be a Messenger: Notwithstanding it was *Triplyed*, that the Pursuer

fuer, in Fortification of the Sentence of Deprivation, and his own Deposition; offered to prove, that it was the common Opinion of the Country, that the Executor was not a Messenger, then being deprived: Which was thought hard by some of the *Lords*; being of the Opinion, that at least *habitus* and *tentus & opinio* ought to have been allowed to both Parties to prove; Reserving to the *Lords*, to Consider the Probation, and to Judge, according to that which should be *Found* most pregnant.

D. 383.

*Paterfón contra Johnstoun. eod. die.*

**I**T was desired by a Bill, That a party, against whom Witnesses had been used, and who had declared, might be allowed to qualify the Inhability of the Witnesses; and that a Terme should be Assigned to that purpose: Whereupon it was Agitate among the *Lords*, If a Reprobator should be sustained by way of exception, whereupon there would be a new Litifcontestation: And it was urged by some of the *Lords*, that if the Inhability of the Witnesses should be qualified upon the ordinary Grounds, whereupon the Witnesses themselves are interrogate, *viz.* That they are not worth the Kings unlaw, and such like; That Reprobator ought not to be sustained; Especially the Party being heard, to object against the Witnesses: And yet the *Lords* sustained Reprobator, by way of exception, and without Limitation; In respect, the Oath of the Witnesses concerning their own Hability is only an Oath of Calumny; and notwithstanding thereof, a Reprobator may be pursued, by way of Action: And the Objections, against the Witnesses, may come to the Parties knowledge, after they have declared: And as there may be Two Litifcontestations, if an exception of Falshood, or any other, should arise upon the Production of the Writs; there is *eodem ratio* as to the Witnesses; seeing the Objections against them could not be proponed before Litifcontestation: And, if they be Relevant, they ought to be proven; And it is the interest of both Parties, that the Reprobator should be received by way of exception; *ne lites proleantur*: But the *Lords* Ordained a Condescendence, to be given in, in Write, of the Grounds of the Reprobator; and to be given to the other party, that he might be heard to debate, upon the Relevancy of the same. *Gibson Clerk.*

D. 384.

*Inglis contra Boswell. 14. Novem. 1676.*

**A** Father having granted Bonds of provision, in favours of his Children being *in familia*; and having thereafter contracted Debt; It was *Found*, That the Creditors, tho posterior, are preferable to the Children: And tho, in other cases, It is presumed That Bonds or Writs, being in the hands of these to whom the same are granted, were delivered *ab initio*; yet, in the case of Children, the Presumption lyes against them, that they are still in the hands of their Parents, so that they are masters of the same: And *eo ipso*, that thereafter they contract Debt, they revoke the said Provisions, In swa far as they may prejudice their Creditors; unless it be offered to be proven, that they were delivered, and were the Childrens Evidents, the time of the contracting the said posterior Debt. *Newtoun Reporter. Mr. John Hay Clerk.*

D. 385.

D. 385, *Davidson contra Wauchop.* 16. Novem. 1676.

**J**OHN *Wauchop*, one of the Macers before the Lords, having taken a Right, by Translation, to a Bond of 700 Merks, alledged granted by the deceast *James Davidson* Jaylor in the *Canongate to Horseburgh*: And a Reduction and Improbation being intented of the said Bond; The Lords did decern in the Improbation; and Found the said Bond to be false and forged; and remitted *Dumbar* Forger to the Justice: Albeit the Writer and Witnesses, and the Debitor and Creditor being all deceast, there were no means left for improving the said Bond directly: Which the Lords did, In respect of the indirect Articles aftermentioned, and the concurrence, in great number and pregnancy, of the presumptions and evidences of falsehood, arising intrinsically upon the inspection of the Write, and the compareing of Papers and otherwayes, viz. 1. That the Debitor *Davidson* was a person most Responsal; and the Creditor *Horseburgh* indigent; So that, the Bond being of date 1644. It could not be thought, that if it had been a true Bond, the Creditor, or his Relict, would, or could have wanted payment so long; nothing being done to recover payment until after 1669. That the said Bond, being Assigned to *Laurie*, was transferred in favours of *John Wauchop*, after all the means of Improbation had failed by the decease of Writer and Witnesses. 2. The said *Laurie* and *John Wauchop* being examined upon Oath, It appears by their Declaration, that the Assignment of the said Bond in favours of *Laurie* was never delivered to him, but was still retained by *Dumbar*, who had Married the Relict of the said *Horseburgh*; and pretended that the said Assignment was made by *Horseburgh*, in favours of his Wife, but left Blank; And that *Laurie's* Name was filled up to the use, and in behalf of the said *Dumbar* and his Relict, for security of a small Debt due to the said *Laurie*. 3. That *John Wauchop* did give to *Dumbar*, for a Translation from *Laurie*, only 300 Merks, and did promise, in case he should recover the said Debt, to pay 200 Merks more; of which, 100 Merks was to be payed to the said *Laurie*; And it cannot be thought, that *Dumbar* would have given away so considerable a Sum, the Bond and Annualrent of the said Sum extending to 100 lib. sterl. for 300 Merks presently, and 200 Merks upon the condition foresaid. 4. It appeared by the Bond and Assignment, that they were written with one Hand, and the Witnesses Subscriptions appeared to be all written with one Hand. 5. The Writer and Witnesses are obscure Persons, and not known; and the designation of them is so general, that they could not be well found; being designed Writers and Indwellers in *Edinburgh*, and no otherwayes. 6. It appeared, by comparing other Papers written by *Dumbar*, both as to the Character, and the Spelling; that the said Papers, being written by *Dumbar*, are the same Write, that the Bond and Assignment is of. 7. It appeared by some Papers subscribed by *Davidson*, produced by *Wauchop* to asstruck and approve, that his Subscription to the said Papers is not like that of the Bond.

Diverse Papers were produced, being alledged to be Forged by *Dumbar*; being Bonds granted by persons who were Dead; and whereof the Writer



Writer and Witnesses were likewise Dead; which did labour of the same Grounds of Suspicion and falsehood: And albeit they were not declared to be false, yet being questioned and a warrant being given by the Lords to apprehend *Dumbar*, he had escaped, and was Fugitive: And the said *Dumbar* is lookt upon, and is *peffima fama* as a Falsary and a Forger.

The Lords were evil satisfied, That their Macer should have taken a Right to, and used such a Write; But as yet have not Censured him. *In presentia.*

D. 386. *Paterfon contra Mckenzie. 22. Novem. 1676.*

THE Defender, in the Improbation of an Assignation, transferred in his favours, being urged to abide by the same; and having offered to abide by the same, as given to him for an Onerous Cause; and as true for any thing he knew: *It was Answered*, That Certification ought to be granted, unless the Defender would abide by the same positively, as a true Deed: Seing, otherways, false Writes might be conveyed through many Hands, and the using of the same might escape *impune*; notwithstanding of the Act of Parliament, against the users of false Writes; if they should be allowed to qualify their abiding by the same, in manner foresaid; which is contrar, to the very Notion of abiding by; which imports a positive asserting the truth of the same. Upon which Debate the Lords Considered the great inconvenients on either hand, if a Right may be taken to false Writes and used *impune*; whereas before any person take Right to the same, they ought to inform themselves concerning the same, and the Condition and Quality of their Cedents. And on the other part, if commerce should be obstructed so far as a Right should not be taken without hazard to Papers, having no intrinsic nullity or defect, that of falsehood being altogether extrinsic, and which cannot be known.

The Lords, in respect the Cedent, who had made the Translation of the Write quarrelled, was Living, Ordained him to abide by the same simply: And suffered the person, who has now Right thereto, to abide at the same with the foresaid quality; But reserved to themselves, at the advising of the Cause, to consider what the said qualification may import in behalf of the User. Actor. *Mckenzie* and others, alteri *Falconer. Haystoun* Clerk. *In presentia.*

D. 387. *Weir contra E. Bramford. 24. November 1676.*

HIS Majesty and the Parliament having rescinded the Forefaulture of the late Earl of *Bramford*, who had been Forefaulted the time of the Troubles for his Loyalty; did so qualify the Act of Rescission and Restitution, that albeit he had Daughters, who by the Law would have been Heirs of Line; yet the Estate was settled by the Parliament, upon his Grand-child, Son to the Lord *Forrester*, who had Married one of the Daughters.

Mr. *William Weir*, having Right by Assignation to a Debt of 5000 Merks. due by the Earl of *Bramford* to *Patrick Ker*, one of the Grandchildren of the said Earl; and a Decreet being obtained for the said Debt, against *Edward Ruthven* the Lord *Forrester's* Son, as having succeeded in the

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faid Estate, and being *bonorum possessor*, and having Right as said is, to said Estate, ought to be Lyable *passive* to the Burden.

The *Lords*, by the said Decreet, Declared, that the Estate should be Lyable; and thereupon Adjudication having followed against the said *Edward*, of a part of the Estate, and Infestment upon the same; the said *Edward* did intent Reduction of the said Adjudication upon that Reason, That the said Decreet against *Edward Ruthven*, whereupon it proceeded, was Extracted wrongouly, and not conform to the Minuts and Interloquitor; which were in these Terms, that the Estate should be Lyable to the Debt; but not that the said *Edward* should be decerned to pay; as the Decreet bears: And that there could be no Adjudication against the said *Edward*, who was not Heir to the said Earl: but there ought to have been a Decreet and Adjudication, against his Heirs of Line, being charged to enter Heir.

Upon Debate among the *Lords*, some were of the Opinion, and did Represent, that there could be no Adjudication against the Heirs of Line, nor Decreet *Cognitionis causa*; seing they could not be charged to enter Heir in special to that Estate, which, by the Act of Parliament did not belong to them; but was settled upon the said *Edward*, as said is; And that the said Decreet against *Edward* was Disconform to the *Lords* Interloquitor; Seing it was not intended, by the said Decreet, that the said *Edward* or any other Estate of his should be Lyable to the said Debt; It being expressly declared in the said Decreet, that he should be free of personal Execution: And the said Decreet was, but in effect, a Decreet *Cognitionis causa*: And therefore behooved to bear the Decerniture foresaid, that he should be decerned to make payment, which was only *dicis causa*, to the effect Execution might follow by Adjudication: And, by the Summonds, whereupon the Decreet proceeded, it was only craved, that the Estate should be affected; And, by the Adjudication, *Bramfords* Estate was only affected, and the Adjudger was content to declare, that he should affect no other Estate.

Yet some of the *Lords* were of the Opinion, That the Decreet not being in these Terms, that the *Lords* decerned *Cognitionis causa*, to the effect Execution might follow against *Bramfords* Estate; It was in *Arbitrio Judicis*, to sustain the Decreet to be a Ground of Adjudication or not: And that Mr. *William Weir*, having been accessory to the Appeals, at the instance of *Callender* from the *Lords* of Session, deserved no favour: And it was carried by plurality, that the Adjudication should be reduced. *Newtoun* Reporter. Mr. *John Hay* Clerk.

D. 388.

*Sheill* Minister of *Prestounkirk* contra *His Parishoners*. 28. November 1676.

THE *Lords Found*, That Viccarage Teinds are ruled by Custom, and Local as to the *Quota* and Kinds, and manner of payment of such Teinds as are truly Viccarage: So far, that in a pursute for Viccarage Teinds; The Defenders Alledging, that some of them had been in use of paying only some certain Kinds by the space of 20. Years; The *Lord Found* the said Alledgance Relevant, to free them of other Kinds; Albeit they did Reply, that the Pursuer was in possession of the Kinds in question within the Parish; some others of the Parish, having been in use

use to pay the same: And that Viccarage is *nomen universitatis, ut Baronia*, and possession of a part interrupts Prescription; and is, in Law, Possession of the whole. *Newtown Reporter.*

D. 389. *John Ker contra Jean Ker. eod. die.*

**I**N a pursute at the instance of a Donator: *It was Alledged*, That the Debt pursued for, was Heretable *quoad fiscum*: And it being *Replied*, That the Pursuer had Right thereto as Executor Creditor: The *Lords Found* Process upon that Title tho supervenient; The Testament being confirmed after the intenting of the Cause.

In the same Cause, It was *Found*, That a Testament being confirmed, the nearest of Kin *ipso momento* has *jus quasitum* to that part of the Goods which belong to them, and do transmit the same to their Executors, and these who represent them; tho the Testament was not Execute, before the decease of the nearest of Kin: And that the said Interest and Action, being in effect a *Legitima*, and competent to them by the Law and Act of Parliament, is settled in their person and doth transmit; tho the same be not recovered in their own time.

D. 390. *Scot contra Toish. eod. die.*

**A**N Assignment, being made in *Holland*, according to the custom there, by way of Instrument, under the Hand of a Notar, a Tabellion having retained the Warrant in his Hands, Signed by the Parties, was sustained, in respect of the custom and *consuetudo loci*. *Justice-Clerk Reporter.*

D. 391. *Drumellier contra E. Tweeddale. 30. Novem. 1676.*

**I**T was objected against a Witness, That he was *Testis Domesticus*, being Servant to the Defender; at least having been his Servant the time of the Citation: Whereunto *It was Answered*, That he was not presently his Servant; and tho he was his Servant the time of the Citation, he might now be a habile Witness: The Reason, why Servants cannot be Witnesses in behalf of their Masters, ceasing in this Case, *viz.* That their Masters might have influence upon them; and that they may declare in their Favours, out of fear, to be put out of their Service: And as to the pretence, that it is presumed, that the Defender put the Witness out of his Service, of purpose, that he might used as a Witness; the same doth amount only to *presumptio hominis*, which *cedit veritati*; And *animus* and design not being probable, but by the Oath of the Party, the Defender and the Witness were free to declare, that he was not removed out of the Defenders Service upon the design foresaid; And it was more strongly to be presumed, that neither the Defender, being a Person of Quality, nor the Witness would perjure themselves.

It was farther urged, That the witness was to be used upon a paper that had been produced after the intention of the Cause, and for improving the Date of the same; And that he was removed out of the Defenders Service before the production of the said paper; So that  
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he could not have that prospect and design to use him as a witness, and that he was removed upon the account foresaid.

The Lords, before Answer, Ordained, that the Time of the production of the said paper might be tryed. *Redford Reporter. Gibson Clerk.*

D. 392. *Grierfon contra The Laird of Lagg.*

1. December. 1676.

A Superior, having obtained the Gift of his own Ward, did pursue his Subvassal at the instance of a Donator, in Trust and to his behoof for Maills and Duties, dureing the Ward: And the Defender having Alledged, That the Pursute was to the behoof of the Superior himself; and that he or his Predecessor had Disponed to the Defender his Lands with absolute warrandice.

The Lords Found, That the Gift of Ward, being given to the Vassal, did accresce to the Subvassal, paying his proportion of the Composition: Albeit it was urged, that as the King might have given the said Gift to another, he might have given it to the Vassal himself; and he could not be in a worse case than another Donator: And that the Subvassal knowing the nature of the Right, that the Superior held Lands ward; was Lyable to all Casualties arising *ex natura rei*, to what Donator soever the same be given.

It was controverted amongst the Lords, What should be the Ground of the Decision in point of Law: And some were of the Opinion, that it was upon that Ground, that *Jus superveniens accrescit*; the Lands being disponsed to the Subvassal *ut optima maxima*: But it was the Opinion of others, That *Jus superveniens accrescit*, when it is either of the Property, or of any Servitude, or of Casualties that had fallen before the Right granted to the Vassal; but not of Casualties arising thereafter *ex natura rei*: And therefore they thought, that the Right should be found to accresce to the Vassal, upon that Ground, that the Relation betwixt a Superior, and his Vassal, and the mutual obligation & *fides* betwixt them, is such and so exuberant, that the Superior should not take advantage of a Casualty fallen upon account of his own person, and by his Minority: And that a Right of Ward, granted to the Vassal himself, or to any other to his behoof, is upon the matter a Discharge of the Casualty, both as to himself, and as to the Subvassal, that is concerned in consequence. *Newtown Reporter. Haystoun Clerk.*

D. 393.

*Home contra Scot. eod die.*

IN a Procefs for Maills and Duties; It was Alledged, That one of the Defenders was in possession by the space of 7. Years, by vertue of a Tack, and had the benefite of a possessory Judgement: And it being Replied, That he ought to say, that he had a Tack from a person having Right: And nevertheless, The Lords Found, That it was sufficient to Alledge, that he had a Tack, and by vertue thereof in so long possession.

This Decision seemed, to some of the Lords, to be hard; in respect a Tennent is not properly in possession, but *detinet* to the behoof the Setter;

ter; So that he could be in no better case than his Master, who, notwithstanding of his possession, either in his own person, or in the person of his Tennent, cannot plead the benefite of a Possessory Judgement; unless he had, or should alledge upon, some Right; And if the Master were called as *de facto* he was in the said process, It were inconsistent, that his Tennent should have the benefite of a Possessory Judgement and not himself. *In presentia.*

D. 394. *Rutherford contra Weddel. 5. December. 1676.*

**T**HE Lords, In a Suspension at the instance of a Bankrupt, who was Prisoner; did allow him to come out without the habite; Because It was represented, that the Debt was for the most part not contracted by himself, but by his Father: Albeit some of the Lords were of the Opinion, that the Act of *Sederunt* bearing no distinction, and being made upon good consideration, and conform to the practice of all other Nations; That Bankrupts should be known by a habite to be persons, that deserved no Trust; and that others may be affrighted from contracting or undergoing Debts, which they are not able to pay: And that the pretence foresaid was frivolous, it not being presumable, that a person would be Heir and become Lyable to Debts, that he had not Contracted, unless there were Effects and sufficiency of Estate, to pay the same: And if such pretences should be allowed; the Law would be altogether elusory. *Gosford Reporter. Mr. Thomas Hay Clerk.*

D. 395. *The Town of Glasgow contra Greenock. 7. December 1676.*

**T**HE Town of *Glasgow*, having intented a Declarator against the Laird of *Greenock*, containing these Conclusions, *viz.* That it should not be lawful to *Greenock*, or his Burgh of Barony, to import any Goods from Abroad; which, by the late Regulation, and Act of Parliament concerning the privileges of Burghs Royal, being the 5. Act of the 3d. Session of his Majesties Second Parliament, belongeth to the Royal Burghs; and are to be imported by them *privative*; and in special Wine, Brandy; and Salt. 2. That if they should be found to contraveen the said Act of Parliament, that the unfree Goods deprehended should not only be Escheat; but their whole Goods; conform to former Laws and Acts of Parliament against unfree Men.

*It was Alledged* for the Defenders; That, at least, they ought to be in the same case as Strangers, and Unfree-men of Forreign Nations; who may import without limitation, making Offer to the Royal Burghs; and if they do not buy the same from them, being obliged to Sell them in whole sale, and at the price to be limited and appointed by the Burgh where Offer is made; and that the Burghs of Barony had been in use of importing as Strangers, the same being qualified as said is; And the said Custom was not contrary to Law, but conform to diverse Acts of Parliament, and in special the 100 Act of *K. Ja. 5th.* his Parliament, bearing, that if any Free-man, or other *Scots-man* dwelling within this Realm, should bring home Wines, Salt, or Timber; That the Magistrates of

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Burghs, where the same is entered, should set a price upon the same; which imports that Unfree-men may import the same.

The *Lords Found*, That by the said late Act of Parliament; The matter of Trade is so regulated; That as the Burghs of Barony their priviledges to import Goods and Commodities, that they could not import before, are settled upon them; and on the other part, Royal Burghs are secured from the encroachment of Burghs of Barony; So that they cannot import, but the particulars allowed to them by the said Act: Therefore that, upon no pretence, the Burghs of Barony and Unfree-Men can import any other Goods; and that they are not to have the Liberty that Strangers have; Seing Strangers are allowed the Liberty of Trade and Commerce, being qualified as said is: And if the same were denyed, there would be no Trade betwixt our Merchants and them: Whereas the Liberty of Trade, and to import Forreign Commodities, is only lodged and settled upon Royal Burrows, upon good Considerations; and *intuitu* of the same they are Lyable to a 6th. part of Taxations, and other publick Burdens.

2. *It was Found*, That, albeit in the late Act of Parliament, there be not mention of Salt as one of the Commodities allowed to the Royal Burrows, and contained in the specification, that the same does only belong to the Royal Burrows; Seing they are founded as to all Commodities, not expressly allowed by the said Act to Burghs of Barony and Regality *in Jure*: And the Burghs of Barony are excluded, by the said Act, as to all others except these allowed to them expressly by the said Act; and come under that general, *viz.* Such as are necessary for Tillage or Building, or for the use of their Manufacture.

And whereas it was pretended by the Defenders, that Salt is necessary for the curing of their Fishes. The *Lords Found*, That Manufacture, intended by the Acts of Parliament, is only to be understood of Works erected by Companies or others for making of Cloath, or suchlike; about which many poor People are Employed and Entertained: And tho there be skill in cureing Herring, they are not a Manufacture, but a Native Commodity, without any alteration of the form, and only qualified by the cureing of the same: And that, upon that pretence, the Defenders ought not to be allowed to import Salt: But was Recommended to some of the Lords, being also upon the Council, to move that a course might be taken for Regulateing the price of Salt; that it be not Arbitrary to the Royal Burrows, to sell the same at such Rates, as the Burghs of Barony cannot, without prejudice, buy the same; So that they may be forced to desist from making or exporting Herring.

The *Lords Found*, That the said Act having defined the pain to be the Escheat of the Goods deprehended; And not the Escheat of the Contraveeners whole Goods: And that as to Goods not deprehended, the pain ought not to be greater: And that these who import unlawful Goods, contrare to the Act, tho they be not deprehended, may be pursued for the value of the same, and no farder.

Some of the Lords were of another Opinion, as to this Point, and thought, that seing the late Act of Parliament, doth mention only the case of unlawful Goods deprehended; and doth regulate the former Practice, as to the attaching and affecting of the same; and it is inconsistent, that both the Goods deprehended should be escheat, and likewise the Contraveen-



ers other Goods should be escheat; That therefore the former Laws are still in vigour. *Actor Lockheart, &c. alteri Cuningham. In presentia.*

D. 396. *Marshall contra Holmes. 12 December 1676.*

**A**N Advocation being produced, after the Judge had decerned, but before he had cleared and dictate the minute of the Decreet; which he did upon the Bench, immediatly after production of the Advocation.

*The Lords Found* the Decreet Null, as being *spreto mandato*: But, in respect of the Circumstances, and that the Judge had decerned before, as said is, they turned it in a Lybel. *The saurer-deput Reporter. Gibson Clerk.*

D. 397. *Durham contra Durham. eod. die.*

**S**IR *Alexander Durham* having upon Death-bed, given Bond to the Lord *Clermout*, for 20000. *merks*; and at the same time, having ordained his Nevy Mr. *Francis Durham* his appearand Heir, to pay to *Adolphus*, natural Son to the said Sir *Alexander*, 6000. *merks*; The said Mr. *Francis* did, after the Defuncts decease, grant Bond relative to the foresaid Bond, and to the order for *Adolphus* his Provision; whereby he ratified the foresaid Bond, and was obliged to pay the said Provision to *Adolphus*, upon this condition, that the Countess of *Middleton* should Warrant and Relieve the Estate of *Largo*, from all Inconvenients, and in special, such as might arise from his Uncles Intromission, with publick Accompts; and if the Estate should not be free, in manner foresaid, that the said Bond should be void.

The said *Adolphus* having pursued upon the foresaid Bond, *It was Alledged*, That it was Conditional, as said is; And the Defender did condescend, that the Estate was distressed for a Debt of 20000 *Merks*, for which a Decreet was recovered against his Heir.

*The Lords Found* notwithstanding, That the said Resolutive Condition was to be understood so, that the Bond should not be void altogether; but only proportionally effeirand to the distress. *Newton Reporter. Mr. Thomas Hay Clerk.*

*This Decision, tho it may appear equitable, appears to be hard in strictness of Law; the precise Terms of the Condition being considered.*

D. 398. *Colledge of Glasgow contra Parishoners of Jedburgh. eod. die.*

**T**HE *Lords Found*, That a Presentation of an actual Minister before the Term, was not a compleat Right to the Stipend; unless there had been a Warrant for his Transportation. *The saurer-deput Reporter. Gibson Clerk.*

D. 399. *Inglis contra Inglis. 13. December 1676.*

**M**R. *Cornelius Inglis*, having granted a Bond to Mr. *John Inglis*, for a Sum due to himself, and for his Relief of Cautionries for the said Mr. *Cornelius*; whereby he was obliged, for his Surety, to infest him in certain Lands to be possessed by him, in case of not payment of the Annual rent due

due to himself, and the reporting Discharges from the Creditors to whom he was engaged : and whereupon the said Mr. *John* was infest by a base Infestment.

The said Mr. *Cornelius*, in respect his Son Mr. *Patrick* had undertaken to pay his Debts, did dispoise to him his Lands ; whereupon the said Mr. *Patrick* was infest by a Publick Infestment.

The said Lands being thereafter Comprised from the said Mr. *Patrick* ; and there being a Competition betwixt the said Mr. *John Inglis*, and diverse other Creditors of the said Mr. *Cornelius* and his Son Mr. *Patrick*, who had comprised the said Lands from the said Mr. *Patrick*: *The Lords Found*, That Mr. *John Inglis* was preferable to the said other Creditors ; In respect, tho their Infestments upon their Comprisings were publick and the said Mr. *John* his Infestment was holden of the granter, yet the said Mr. *John*'s Right was publick as to Mr. *Patrick*, in swa far as, the said Mr. *Patrick* had corroborate the same ; and, before the said Comprisings, had made payment to the said Mr. *John*, of certain bygone Annualrents, in contemplation of his said Right ; and had taken a Discharge from him, relating to the same ; so that his Right, being Publick as to Mr. *Patrick*, was publick as to those who had Right from him ; and Infestments holden of the Granter, being valid Rights by the Common Law ; and by Act of Parliament and Statute, invalid only as to others, who had gotten publick Infestments, in respect of the presumption of Fraud and Simulation ; the said Presumption *cedit veritati*, and in this case is taken away in manner foresaid.

*The Lords Found*, That notwithstanding that the Right was granted to Mr. *Patrick*, upon the Consideration foresaid, and for payment of the Debts thereinmentioned, that the Creditors mentioned in the same, had not a real Interest in the said Lands, but only a personal Action against the said Mr. *Patrick* ; in respect the said Right was not granted to him for their use and behoof ; neither was it expresly burdened with their Debts : and therefore the *Lords did Find*, That all the Creditors, both of the said Mr. *Cornelius* and Mr. *Patrick*, who had Comprised within Year and Day, should come in *pari passu*.

D. 400. *Margaret Nevoy* contra the Lord *Balmerinoch*.  
*eod. die.*

THE Lord *Balmerinoch* was pursued, as Representing and Behaving as Heir to the Lord *Couper*, at the Instance of *Margaret Nevoy*, and diverse other Creditors of the said Lord *Couper* ; upon that Ground, that he had ratified a Disposition, made by the said Lord *Couper*, in favours of his Lady on Death-bed ; and was obliged to comprise the saids Lands, and to give the said Lady a Right to the Comprysing, to be deduced, that should be preferable to other Creditors ; And that by the Act of *Sederunt* in my Lord *Nithsdales* Case, appearand Heirs, granting Bonds to the effect their Predecessors Estate may be established in their Person or in the Person of some Confident to their behoof, are lyable as Behaving : and *It was Alledged* for the Defender, that Behaving is *magis animi quam facti*, and it is evident that the Defender did shune to be Heir ; and did of purpose take the Course foresaid, that he should not represent the defunct.

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*The Lords Found*, That the Condescendence was only relevant in these Terms, viz. That the Defender, or any Confident to his behoof, had comprised the said Estate for *Balmerinoch's* own Debt; and had posselt by vertue of the Compyring: Or that the Lord *Balmerinoch* had communicate the Right of the said Compyring to the Lady *Couper*; and that she had posselt by vertue thereof; and could not defend her self with her own Right as being *in Læto*, Or otherwayes defective.

It was the Opinion of some of the *Lords*, That it was sufficient and Relevant to say, that *Balmerinoch* had Compyrised for his own Debt; and was obliged to Communicate the said Compyring; and had ratified the Lady *Couper's* Right: For these Reasons. 1. The Law considers *quod agitur*, and not *quod simulate concipitur*; And the Lord *Balmerinoch*, by taking the course foresaid to compyrse for his own Debt, intends upon the matter *adire*, and to carry away his Uncles Estate, to frustrate Creditors. 2. Tho it be pretended, that there is a difference betwixt *Nithsdal's* Case and this, In respect in that case, the Adjudication was upon Bonds granted by himself, after his Fathers decease; And, in this, the Compyring is for my Lord *Balmerinoch's* Debts, Contracted before my Lord *Couper's* Death; The said difference is not considerable, seing as to that case, there was a design to carry away the Defuncts Estate, by a Deed of the Appeairand Heir, to the prejudice of Creditors; and there is the same in this. 3. Tho my Lord *Balmerinoch* had granted only a Ratification, without Communicating any Right; *eo ipso* he behaved as Heir; In respect he had ratified the Ladies Right, for any Right or Interest he had himself; and he had an Interest, as Appeairand Heir, sufficient to establish a Right in the Person of the said Lady, and to preiudge Creditors; so that they could not question the same; Seing Rights on Death-bed, being consented to by the Appeairand Heir when they are made, or *ex post facto*, become valid and unquestionable *ex capite Læti*, as appears by the Law of the Majesty, concerning Rights on Death-bed.

D. 401. Earl of *Argyle* contra The Lord *McDonald*.  
14. December 1676.

THE Earl of *Argyle*, having pursued the Lord *McDonald*, for Reduction of a Feu holden of the Pursuer *ob non solutum Canonem*; It was Alledged, That the Defender had a disposition of the Superiority from *Lochzeal* before my Lord *Argyle's* Right, by a Disposition likewayes from him: And tho my Lord *Argyle*, having compleated his Right before the Pursuer by an Infeiment upon the same, will have Right to the Feu-duties after his Infeiment; yet the Defender had Right to the bygones by the foresaid Disposition made to him; which, being of the Lands and Superiority and made to the Vassal himself, was, upon the matter, an Assignation to the Feu-duties and a Discharge: And farther, That as to the Feu-duties after my Lord *Argyle's* Right, he was *in bona fide*, not to pay the same, having the foresaid Disposition as said is: And my Lord *Argyle* having done nothing upon his Right to make Interruption; And therefore the Summonds ought not to be sustained upon Cessation and not payment, before Intimation of the Pursuers Right to the Defender: Both which Alledgances the Lords Found Relevant.

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In the same Case, The Lord *McDonald* having proponed an Alledgance, viz. That my Lord *Argyle* was obliged by Bond to warrand *Lochzeal* at the Hands of the Defender; and of any pursute competent upon the said Disposition made to the Defender, & *quem de evitione tenet Actio, agentem repellit Exceptio*; And the same being Found Relevant, the Defender giving his Oath of Calumny thereupon; The Lords, In respect the Defender being in Town had refused, at least had not come to give his Oath of Calumny, had decerned: But the Lord *McDonald* having intented Reduction of that Decreet, upon offer to give his Oath of Calumny; upon pretence, that it was towards the end of the Session, when his Oath of Calumny was craved; and that upon some occasions, he had been forced to go home, *It was Alledged* for the Earl of *Argyle*, that upon *McDonalds* Refusal to give his Oath of Calumny, it was, in construction of Law, a Calumnious Alledgance, and could not now be received; And the greatest favour could be shown to him, was, that he should be heard to verify the same *instante*. The Lords did decern, superseding Extracting, until a day in *January*; that, in the mean time, the Defender might verify the said Alledgance; having taken his Oath of Calumny, that the Write was not in his own Hand. *Actores Lockheart and Bernie. alteri Cuninghame and Thoirs. In presentia.*

D. 402. *Litlejohn contra Mitchel. eod. die.*

THE Lords Found, That Bonds granted on Death-bed, albeit they are Legacies, as to that effect, that they do affect only the Deads part, yet they are preferable to other Legacies left in the ordinary wayes of Legacies; and that the Defunct was in *legitima potestate* as to the affecting of his part, and granting of Bonds to that effect. *Justice Clerk Reporter. Gibson Clerk.*

D. 403. *contra eod. die.*

THO in Improbations the user of Writes, questioned as false, ought to compear to abide by the same; yet a Commission was granted to take the Defenders Declaration that he did abide by, In respect he was a person of great Age.

D. 404. *Wallace contra Murray. eod. die.*

THERE being a pursute, at the instance of a Creditor against the Representatives of an Introrgetter with the Debtors Goods, The Lords Found, That the Passive Title of Introrgetter could not be sustained, after the Introrgetters decease, to make him Lyable as universal Introrgetter: And yet sustained the same in *quantum* he was *locupletatus*; the Pursuer for the Defenders sarder surety, confirming before the Extracting of the Sentence, a Testament as Executor Creditor to his Debitor. *The Treasurer Depute Reporter. Gibson Clerk.*

D. 405. *Grant of Rosollis contra L. Bamff. 19. Decem. 1676.*

THE Lord *Bamff*, having acquired the Lands of *Craigstoun* from *John Lyon*, did give three Bonds to the said *John Lyon* Blank in the Cre-

Creditors Name, containing each of them 5000 *Merks*; And, at the desire of the said *John*, did give a Letter with the said Bonds with a Blank direction, bearing that the said *John Lyon*, having Disposed to him the Lands of *Craigstoun*, for which he had become Debitor by certain Blank Bonds containing 5000 *Merks*; And therefore desiring that no person might scruple to take the said Bonds; For it should be no dissatisfaction to him, that they took them without acquainting him; but that it should be holden, as if they had received the Bonds in the beginning, and had their Names filled up therein at that time.

The said *John Lyon* did fill up the Name of *John Grant* of *Rosallis* in the said Bonds; and delivered the said Letter to him, putting a direction upon the same, for the said *John Grant*: Whereupon the Lord *Bamff* being charged did Suspend, upon that reason, that he ought to have Retention, because the said Bonds were granted for the price of the said Lands and in contemplation of a valid surety, free of all Incumbrances; and the surety not being valid, In respect the Lands were affected with *Hornings*, *Inhibitions*, and *Compyrings*, equivalent to the Sums contained in the Bonds; he had in Law Condition, as being *ob causam non secutam*.

There was also compareance for the Donator of the said *John Lyons* *Escheat*, who did produce his Gift and Decreet of general Declarator; and Alledged, that he ought to be preferred, because he had Right to the Sums due by the said Blank-bonds; In respect the Chargers Name was filled up *in cursu Rebellionis*: And the said Blanks, being *ab initio* the Rebels, while they were Blank, they fell under his *Escheat*; and he could not fill up, or deliver the same, in prejudice of the Fisk.

The Lords Found, That the pretence fore said of *Condictio causa data*, tho competent against the said *John Lyon* himself, if the Bonds had been filled up in his own Name, would not be competent against the Charger, if his Name had been filled up *ab initio*; Because if the Suspender had been content to give Bond to him, It would have been *delegatio*, in which case the Exceptions competent against *delegantem* would not have been competent against the Person, in whose favours the Delegation was made: And that the Charger was upon the matter in the same case, seeing the Suspender by his Letter was content, that the Bonds should be holden, as if they had been filled up *ab initio*.

The Lords also Found, That the said Bonds being Blank, tho they continued Blank, were the said *John Lyons* proper Bonds; and if he had deceased before the filling up of the same, they would have fallen under his Executry; and consequently, he being Rebel and his *Escheat* gifted and declared, they fell under his *Escheat*: And His Majesty, and the Donator could not be prejudged by any Deed of the Rebel, in filling up of the same.

It was also Found, That albeit the Lord *Bamff*, by his Letter, was bound up, that he could not question the said Bonds upon the pretence fore said of *Condictio*, or any other that might have been competent against the said *John Lyon*; Yet, notwithstanding of the said Letter, the King might have given, and he might accept either a Gift of *Lyons* *Escheat*, or a Right from the Donator, and thereupon might claim Right to the said Sums. *Tesaurer Depute Reporter. Mr. John Hay Clerk.*

D. 406. *Tennent, Young, and others, contra Sandy Procurator-Fiscal of the Regality of Ogilface. eod. die.*

**I**N a Declarator of a Liferent-Escheat; *It was Alledged*, That there could be no Escheat upon the Horning Lybelled; Because it was upon Letters direct by the Secret Council, upon a Decreet of a Regality Court; And by the Acts of Parliament, The Lords of Session are only warranted, to direct Letters of Horning summarly, upon the Decreets of Sheriffs, and Baillies of Regality, and other Inferior Judges.

*The Lords Thought*, That the Council could not direct Letters of Horning upon the said Decreet; Seing, before the Acts of Parliament, Letters of Horning could not be direct upon the Decreets of Inferiour Judges summarly, without a Decreet *Conforme* before the Lords of Session; And Statutes being *Stricti Juris*, the Council could not direct Letters, unless by the same Statute they had been warranted to that effect; and it appears, that the said Statute was founded upon good Reason and Considerations, tho they be not exprest, *viz.* That the Lords of Session are always sitting in the time of Session; and in vacance, there is some of their Number appointed to receive and pass Bills of Suspension, if there be cause; whereas the Council sitteth but once a Week ordinarily in Session-time; and in Vacance but thrice. 2. The Lords do not pass Suspensions but upon good Reasons, and they are to consider the said Decreets, which is not proper for the Council. 3. As Suspensions are raised of the said Decreets, so oft times there is a necessity of raising Reductions; and the Lords of Council are not competent Judges to the Reduction of the said Decreets: But the Lords thought not fit, that there should be a question betwixt them and the Council, concerning their Priviledge; and therefore did forbear to give answer, until some accommodation should be endeavoured: And it was proposed by some, that the Decreet of the Regality Court, being for keeping of Conventicles; and that practice, concerning so much the Peace of the Countrey, that all Disturbance thereby might be prevented; and upon that account, it being recommended to the Council, by Act of Parliament, that they should see the Laws against Conventicles put effectually in execution; The Council, as they might convene the Contraveeners before themselves, may commissionate the Inferiour Courts to proceed as their Delegats; and upon their Decreets given by them as their Delegats, that they may direct Letters of Horning. *Treasurer-depute Reporter.*

D. 407. *Ker contra Hunter. 20 December 1676.*

**A** Personal Action was sustained, upon a Right of Annualrent, against the Tennents during their Possession, for the Mails and Duties effeir- and to the said Annualrent. *Treasurer-depute Reporter. Mr. Thomas Hay Clerk.*

D. 408. *Carnegie of Balmachie contra Durham of Anachie. eod. die.*

**T**HE Lords Found, That albeit by the common Law, Annualrent be due for Tocher; yet, by Our Custom, it is not payable, unless it be so pro-



provided by the Bond or Contract for the same: but in the case in question, *They Found* the Defender lyable to pay Annualrent, in respect the Debtor had been in use of payment, at the least, had promised to pay Annualrent for certain years bygone: and Annualrent once payed, implyes a tacite Paction to continue the payment of the same. *The saurer-depute Reporter.* Clerk.

D. 409. *Veitch contra Pallat. eod. die.*

**T**HE Lords Found, That a Rebel, contracting Debt after Rebellion, cannot assign in satisfaction of the same, any debt due to him: and tho the Assigney should transact with the Debtor of the Debt assigned, before a Gift and Declarator; the Donator will be preferable. *Lockheart and Hog for Veitch, alteri Cunningham and Seaton. Gibson Clerk. In presentia.*

D. 410. *Inter eosdem. eod. die.*

**A**ND in the same Case, *It was Found*, That a Bond granted after Horning, tho it did bear that the same was for Wines; yet being the Rebels assertion, could not prejudice the King: but it being alledged, and offered to be proven, that the said Wines were truly furnished before the Rebellion: *The Lords Found* the Alledgance relevant to be proven, only by the Rebels Compt Books, and by Books of Entry; and not simply by Witnesses, without such Adminicles in Write.

D. 411. *Pallat contra Veitch. eod. die.*

**T**HE Lords likewise Found, That the Presumption introduced by the Act of Parliament, that Gifts of Escheat are simulate, in respect that the Rebel is suffered to possess; is only in that case, where the Rebel has a Visible and Considerable Estate of Lands or Tacks, and is in possession of the same: but when the Rebels Estate is either not considerable, consisting only of an Aiker or two, (which was the case in question) or *in nominibus*, and not known to the Donator, so that the Donator had reason not to trouble himself, and to look after either that which was inconsiderable, or which was not known to him; there is no ground to presume that the Gift is simulate.

D. 412. *Tait contra Walker. 22. December 1676.*

**T**HE Children of a second Marriage, having pursued the Son of the first, for Implement of their Mothers Contract of Marriage, and the Provisions therein contained in their favours: *It was Alledged*, That they were Debtors themselves, in swa far as, they were Executors named and confirmed to their Father: And *It being Replyed*, That the Testament was given up by the Mother, they being Infants for the time, and she was not their Tutrix, and so could not bind them.

*The Lords Found*, That there was Difficulty in the case, in respect the Pursuers were now past 40 years, and they had never questioned or desired to be reponed against the said Confirmation: And on the other part, It was hard, that a Deed of their Mother, having no Authority to do the

same as Tutor or Curator should bind them; and there was no necessity to be reponed against the same, it not being their Deed, and being *ipso Jure* void: and therefore before Answer, the *Lords* thought fit to try, if the Pursuers had meddled with any part of the Executry, or had done any Deed that could import Homologation of the said Testament. *Newbyth* Reporter.

D. 413.

contra

*eo l. die.*

**I**T was questioned amongst the *Lords*, whether an Inhibition could be sustained, albeit the Execution did not bear a Copy to have been affixt at the Mercat-cross; And it was Resolved as to the future, it should be declared, that Executions of Inhibitions should be null, unless Copies were affixt; In respect there can be no Executions without giving of Copies, either personally, or at their dwelling house: And when the Leidges are inhibitit at the Mercat-cross in general, so that a Copy cannot be given to every person, it ought to be left at the Mercat-cross *in subsidium*: But, because it was informed, that many Executions did not bear Copies to be left at the Mercat-cross, The *Lords* did forbear to give Answer as to the Inhibition in question, until the stile and custom should be tryed.

D. 414.

Dick of Grange contra Sir Andrew Dick.

22. December. 1676.

**S**IR *Andrew Dick* having obtained, upon a Petition to His Majesty, a Warrant to the Exchequer, to pay to his Wife and Children 130 *lib. sterl.* Yearly: The said Annuity being Arrested at the instance of *Dick of Grange*; It was Alledged, in a Process to make forthcoming, that, being Alimentary, it could not be Arrested: Whereunto it was Replyed, that the said Sum was not Alimentary, so that it could not be affected with Sir *Andrew* his Debts; In respect, whatfomever belongeth to a Debitor, either on his own Right or *Jure Mariti* is Lyable to his Debts; and it is not in the Power of a Debitor to make any thing belong unto him Alimentary, but there must be an expresse constitution to that effect; which is only in that case, where the King or any other person doth give any thing, and doth qualify their own Gift with that expresse provision, that it should be only for the Aliment of the person gratified, that it should not be affected with any Debt or Execution for the same; whereas His Majesties Grant was only in the Terms foresaid, and was procured from His Majesty, not upon any special consideration or respect to Sir *Andrew's* Lady, but upon a Representation made by Sir *Andrew*, that he had a former Wadset from the Earl of *Mortoun* of his Estate in *Orkney*, and the same being taken from him by a Reduction at the instance of His Majesty of the Earl of *Mortoun's* Right of *Orkney*; he and his Family would be in a sad condition: And therefore the said Annuity being granted by His Majesty in lieu and *intuitu* of the said former Right, *surrogatum sapit naturam surrogati*.

It was farther Replyed, That albeit the said Annuity were Alimentary, the Pursuers Debt ought to affect the same, being likeways Alimentary, In respect it was for Money furnished for the Aliment and Entertainment  
of

of the said Sir Andrew and his Lady, & *privilegiatus non utitur privilegio Contra privilegiatum.*

The Lords Found, That the said Annuity was Alimentary and could not be Arrested, and the Aliment being *de die in diem*, the Debt due to the Pursuer could not affect the same, unless it had been for Aliment, while the Annuity in question was *in cursu*. Forret Reporter. Mr. Thomas Hay Clerk.

D. 415. E. Argyle contra The Laird of Mcnaughtoun.  
3. January 1677.

**I**N a pursute at the instance of the Earl of Argyle, against the Laird of Mcnaughtoun, who held some Lands of him Ward, for the single avail of his Marriage; It was Alledged for the Defender. 1. That the Defender had Married the time of the Usurpation, at which time the Casualties of Ward and Marriage were taken away by an Act and Proclamation of the Usurpers, whereby the Defender was secured and was *in bona fide* to Marry without requiring the Superiors Consent. 2. *De facto* the Superior had consented to his Marriage, In swa far as the Defender having given notice to him by a Letter, the Marquess of Argyle being then at London, that he was to Marry with a Gentle-Woman, who is now his Wife, the Marquess did return a Letter (which was produced) showing that he could not but approve his matching with the said Gentle-Woman being the Laird of Ardkindles Daughter; and if they should proceed to the Marriage, that he wished them well.

Whereunto, It was Replied, That the Usurpers by their Act could not prejudice the Pursuer, or any other Superior, but that they might claim the Obventions and Casualties, that did fall unto them, by the nature of their Vassals Right; as it was found in the case of Sir George Kinaird and the Master of Gray, that Lands holden in Ward being Disposed in the time of the Usurpation, without the Superiors consent, did recognise notwithstanding of the said Act: And as to the said Consent, It was Replied, that the said Letter was but a Civil Complement, without any mention of the Marquess his Interest as Superior, and without an express Licence to Marry, and Discharging any Interest, or pretence that he had to the Defenders Marriage.

Upon Debate at the Bar and among the Lords, Some wers of the Opinion, that there being no Contempt that could be alledged of the Superior; and the Vassal having so much reason to think, that he needed not his Consent, In respect the said Act was a Law *de facto*, and for the time; the whole Country being forced to submit to the Usurpers, and to acquiesce to their Orders; That *Communis error facit Jus*, and *quævis causa excusat* as to Casualties arising upon feudal Delinquency or Contempt: And the Superiors Interest, that was intended of the Law, was not that he should have a Sum of Money, but that his Vassal should not Marry without his Consent, and match with Families either disaffected, or in which the Superior could not have confidence; and the avail of Marriage is penal in case the Vassal should either Marry without the Superiors consent, or should refuse to Marry a person profered by the Superior to be his Wife.

Upon



Upon the foresaid Considerations, they were of Opinion, that the Defence was relevant; and that there was a great difference betwixt the case of Recognition and Marriage, in regard the reason of the Decision in the case foresaid, was, that the Vassal did upon the matter condemn the Superior, after the Kings Restitution, seeing he did not apply for a Confirmation; Whereas the Vassal, being once married, it were to no purpose to desire the Superiors Consent.

On the other part, some of the Lords argued, that the single Avail is not penal, but only the double; seeing the Vassal, attaining to the age of marriage, if he should die unmarried, yet the single avail would be due: Whereunto *It was Answered*, That *pœna* is in Law, when a Person is lyable to pay a Sum, either for doing or not doing a Deed; and as the Vassal is lyable to the double Avail, for refuseing the Person offered by the Superior, so he is lyable to the single for not marrying, and tho *matrimonia* are libera, so that a Person may marry or not as he pleases, yet *causative* many things are allowed, which cannot be directly: And it being the design of the Feudal Law, and Superiors, ingiving out their Lands, to have still Vassals to serve them and their Family, the appearand Heir is obliged by the nature of his Holding to marry, or *in pœnam* to pay the avail: and if the Vassal should desire his Superior to offer him a Person that he might marry, or to consent that he should marry, such a Person as he thought fit for him; and the Superior should refuse both, it were hard, that notwithstanding the Vassal should be lyable to pay the Avail of his marriage.

*The Lords nevertheless Found*, That the single Avail of Marriage is not penal. *Actores* Lockheart and Hamilton, *alteri* Cuninghame. Mr. John Hay Clerk. *In presentia*. Vide infra 23. January 1677. *inter eosdem*.

D. 416. *Mitchelson contra Mitchelson*. 4. January. 1677.

A Younger Brother, being served, before the Baillies of *Kirkcaldie*, Heir of Line to the immediate elder Brother: Thereafter the eldest Brother did desire to be served Heir of Conquest to the same Person; and the Baillies not being clear to proceed, in respect of the former Service, unless it had been reduced: *The Lords Thought*, That, upon their Refusal, the Elder Brother may Advocate for Iniquity; and that the Brieves may be served before the Macers: and that the Eldest Brother being wronged by the foresaid Service, to which he was not called, so that it was *res inter alios acta*, he ought not to be prejudged thereby, nor put to the trouble and Charges of a Reduction. *Gibson* Clerk.

D. 417. *Earl of Glencairn contra* *Brisbains*.  
5. January 1677.

*Francis Freeland* of that Ilk, having disposed to *John Mcknair* and *Robert Hamilton* irredeemably: and they thereafter having disposed the same, with consent of the said *Francis*, to *John Brisbain*: And the said *John* having granted a Reversion to the said *Francis* his Heirs of his own Body allanerly; for payment of the Sum of 8000 *merks*, and what farther Sums should be deburied for improving the Lands, building or repairing the Houses, with Annualrent frae the Debursements, upon the said *John Freeland* his own Declaration; and that after the first Term af-

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ter the said *Francis* his decease: The Earl of *Glencairn*, Creditor to the said *Francis Freeland*, alledging that the said Reversion was granted by Fraud and Contrivance, and in prejudice of him and Lawful Creditors; and that the said Reversion was granted in manner foresaid, not in favours of his Debitor but his Heirs for eludeing their Execution; Pursued a Reduction of the said Disposition made in favours of *Hamilton* and *Mcnaire*; and a Declarator that *Brisbaines* Right should fall in consequence; and that it should be lawful to him to comprise the said Reversion, and to use an Order as if it had been granted to the said *Francis Freeland* himself.

The Lords Thought, That if the Price were not adequate (which was to be tryed) the Conclusions foresaid should be sustained. *Thefaurer-depute* Reporter. *Gibson* Clerk.

D. 418. Creditors of *Mouswel* contra The Lady and Children. 6. January. 1677.

*James Douglas* of *Mouswel*, by Contract of Marriage, betwixt his Eldest Son *James Douglas*, and *Lawrie*, did dispoise to his Son the Fee of his Estate, reserving his own Liferent; and with a Provision, to be contained in the Infestment, That it should be lawful to him to take on and burden the Estate with the Sum of 18000 *merks*, for the Provision of his other Children, and for doing his other Affairs: And accordingly the said *James* did provide, to eight Children, 9000. *merks* out of the said Estate, by a Bond granted within a year after the said Marriage, and Infestment thereupon.

Both the Father and the Son the Fiar being deceased; and the Son having left only one Son of the Marriage an Infant; there followed a Contract betwixt *Agnes Rome* Grandmother to the Child, and *Janet Lawrie* the Mother, and certain Friends of the Family, whereby it was agreed, that the Grandmother should quite 200 *merks* of her Liferent yearly, and the Mother 400 *merks* of her Liferent; and that the Grandmother should Confirm her Husbands Testament for payment of his Debts; and for the *superplus* of the Debt, the Friends should undertake the same; and upon payment, having taken Right thereto, should superceed personal Execution, until the Child were *major*; the Annualrents being in the meantime payed by the Grandmother, as Tutrix to her Grandchild. The Grandchild having deceased, while he was yet Infant; both the Creditors and the Friends, and the Relict, did take a course to affect the Estate by Comprysings; and upon their Infestments and Rights, having pursued the Tennents, so that they were forced to raise a multiple Poinding; It was Alledged for the Creditors, That the Grandmother her Liferent ought to be restricted, conform to the said Contract, whereby she had discharged the said 200. *merks* yearly: Whereunto It being Answered, That *res devenerat in alium casum*; and that the said Restriction was in favours of her Grandchild, and for the standing of the Family, and in contemplation of the Undertaking, and Obligement foresaid of the Friends, which they had not done, and *cessante causa cessat effectus*: and, the Estate being altogether ruined, she ought to be in her own place.

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And albeit it was thereto *Replied* by the Creditors, That, whatever might be pretended to be the impulsive Cause, yet the said Restriction being once granted doth continue, notwithstanding of the pretence foresaid; seeing there is no resolute Clause or Provision, that the Case above-mentioned falling out, the Grand-mother should be in her own place; but on the contrary it appears by the Contract, that the Death of the Child was then under her consideration, In respect, it is provided expressly, that if the Child should die the Restriction of the Mothers Life-rent should cease, and she should be in her own place; and so, the Provision foresaid being only in favours of the Mother, and not of the Grand-mother, *Exceptio firmat Regulam in non exceptis*: It being considered likewise, there was not the same reason for the Grand-mother, In respect by the decease of the Child, the Mothers Interest in the Estate did altogether cease, whereas the Heir, who did succeed to the Child, was the Grand-mothers own Son: And as to the pretence, that the Friends had not fulfilled their part of the Contract, *It was Answered*, that the Contract being in effect in favours of the Family, both the Relict and the Creditors were thereby obliged, and might yet be urged to fulfil their obligations: And tho they should both fail, the Family could not be prejudged; and that the Friends, accordingly as they were obliged, they had taken course with the Debts: and tho it was pretended that they had not done it *debito tempore*, the said pretence was of no moment, seeing no time is limited by the Contract.

Nevertheless the *Lords* Reponed the Relict against the said Restriction.

In the same Cause, There being a Competition betwixt some of the Creditors, whose Debts were Contracted by the Grand-father *Agnes Rom's* Husband before his Sons Contract of Marriage; and betwixt the Children, who were Infeft, as said is, upon the Bond of Provision, granted by their Father, conform to the faculty foresaid.

*It was Alleged* for the Creditors, That they ought to be preferred, In respect, that upon Bonds of Corroboration granted by the Son the Fiar, they had Comprised and were Infeft by publick Infeftments; at least had charged the Superior; So that their Right being publick, and for a true Debt anterior to the Childrens Provision, they were preferable to the Children, their Infeftment being base.

The *Lords Found*, That the Children should be preferred, In respect the Comprysings were against the Son; and the Comprysers could be in no better Case than the Son himself, whose Right was affected with the said faculty in favours of the Children: So that neither he, nor any having Right from him, could question the Right granted by virtue of, and conform to the said Faculty.

This Decision, being by plurality, seemed hard to some of the *Lords*; who did consider, that the foresaid Faculty was not only in behalf of the Children, but of supervenient Creditors, if the Father had thereafter Contracted any Debt, and if the Father had given surety to the said Supervenient Creditors by base Infeftments, and if his Anterior Creditors before the said Contract had comprised and had been Infeft, they would have been preferred to the said posterior Creditors having only base Rights, and *multo magis* to the Children.

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They considered also, That the Estate being, by the said Contract, Disposed simply to the Son, with a Reservation only of the Fathers Liferent and the said Faculty; and the Son not being obliged to pay the Fathers Debts by the said Contract, if there had been 18000 *Merks* of Debt anterior to the Contract, Anterior Creditors might have pursued the Son for the same, not only because he was Apperand Heir and *Successor Titulo Lucrativo*, but because he was obliged by the Contract, at least his Estate burdened for the said Sum; And the Anterior Creditors might either have taken that course, or might have Comprysed the Interest competent to the Father by the said Faculty: And seing the Son might have been forced in manner foresaid to satisfy the said Creditors, he might have granted Bonds of Corroboration; whereupon they might have Comprysed; and having comprysed, and having gotten publick Rights, they are preferable to the bare Right of the Children.

In the same Cause, The Creditors did alledge, that they ought to be preferred to the Children, because their Provision was after their Debt, and was without an Onerous Cause; And nevertheless the Lords Found the Defence for the Children Relevant, *viz.* That their Father, the time of the granting of the said Bond, for their Provision, had a sufficient Estate, besides, out of which the Creditors might have been satisfied.

This Decision, being also by the Major part, seemed hard to others, who thought that a Debtor could do no Deed in prejudice of his Creditors, without an Onerous Cause: And tho the Father might be looked upon, the time of the granting of Provisions to Children as in a good condition, and therefore the Creditors to be secure and needed not do Diligence, yet if thereafter he should become insolvent, the loss ought to be upon the Children, and not the Creditors: And that it being a principle, *That a Debtor can do nothing in prejudice of his Creditor, without an Onerous Cause*, It is certainly both Fraud and prejudice, that he should not pay his Debt, but should give away, to his Children, that part of his Estate which the Creditors might have affected: And Inhibitions being only in these terms, *That the Party Inhibite should do no Deed in defraud of the Creditor*; It might be pretended, by the same Reason in Reductions *ex capite Inhibitionis*, that the Party Inhibite did nothing in defraud or prejudice of the Pursuer, In respect, the time of the granting the Bond or Right craved to be reduced, he had Effects and sufficiency of Estate beside. *Lockheart &c. for Queensberry and other Creditors. Cuninghame, Anderson and McKenzie for the Children and Relict. Gibson Clerk. In presentia.*

D. 419. *Stewart of Castlemilk contra Sir John Whitefoord.*

10. January 1677.

SIR Archibald Stewart of Castlemilk, having pursued a Reduction of a Disposition of the Lands of Coats, made by James Stewart of Minto, in favours of Sir John Whitefoord; *ex capite metus*: In swa far as, the said Sir John Whitefoord had taken the said James and kept him *in privato carcere* for some time; and thereafter, having a Caption against him, had detained him Prisoner: and had caused transport and convey him in that condition, from diverse places in the night Season; and by his Servants had threatned him with long Imprisonment; and in end had prevailed with

with him to dispone to him the saids Lands, being eight Chalders Victual of Rent, and where there was a Coal of 100. *lib. sterl.* of Rent; upon an Obligement only to pay him an yearly Annuity of 400. *merks*: In which process, the said Sir John, and Duke Hamilton, who had thereafter acquired the said Lands from the said Sir John, did compear, and propone the Defences following. 1. That the foresaid Qualifications of Force were not Relevant to import *metus*, *qui potest cadere in Constantem virum*, being neither *mortis* nor *Cruciatu*; nor so circumstance, as is required of the Law, for founding the said Action. And 2 That albeit *metus* were relevantly qualified, the foresaid Deed cannot be questioned upon pretence of the same, unless the said James Stewart had been lesed or damnified by the same; Seing it appears by the Title, *quod metus causa*, &c. A Reduction and Restitution upon that head is not competent, *ubi non est damnum, & nihil absit*; as is clear by diverse Texts, in the case of a Creditor using force to get what is unquestionably due to him; and in this case the said James had no prejudice, in respect he was obliged by an antecedent Minute to dispon the said Lands: so that the said Disposition was but for implement of the said Minute, which the said Sir John did give back to be cancelled by Minto, when he got the said Disposition. And 3. It was offered to be proven, that, after the said James was at liberty, the said Disposition was granted by him.

The Lords Found, That the Libel and Qualifications of *metus* and Force were relevant; and yet, in respect the Defenders were so positive as to their Alledgance, that the Disposer was at liberty when he granted the said Right; they allowed a conjunct Probation concerning the said Qualifications of Force, and the condition the Disposer was in for the time, and the way of granting the said Right; whether he was under Restraint and the Impression of Fear, or in Freedom? Or whether the same was granted by him freely and voluntarily?

As to the said other Defence, that there was no *damnum*, the Lords repelled the same; and would not allow that point of Fact to be tryed, whether or not there were a former Minute, for Implement of which the said Right was granted? And whether it was given back for, and the time of the granting of the said Disposition?

Some of the Lords were of the Opinion, That the Qualifications libelled, were not relevant to import such a force and *metus*, as could be the ground of a Reduction of the said Right; *ex eo capite*; tho they were convinced that the practice foresaid is most unwarrantable and *dolosa*; and that thereupon the Right may be questioned as to Sir John himself, but not as to a singular Successor: and that there is a difference betwixt a Reduction *ex capite metus*, which is competent against singular Successors; and a Reduction *ex capite doli*, which is not competent against a singular Successor, who *bona fide* has acquired a Right, for an Onerous Cause.

But diverse of the Lords were of Opinion, that the Defence foresaid, that there was no *damnum*, was most relevant, for these Reasons; *viz.* All Restitutions upon what *mediums* soever, whether *metus* or *dolus*, or *lubricum atatis*, are against *damnum* and prejudice; for *frustra* should Restitution be craved, if there be no *damnum*. 2. It is evident by diverse Laws, and the Title foresaid, *quod metus*, &c. That *ex edicto quod metus causa*, &c. *non datur actio si nihil absit*; & *succurritur* only *captis & latis*

*lasis.* 3. By the Civil Law, there were diverse Remedies competent to these who had been forced to do any deed; *viz.* A Civil action *ex Edicto Pratoris*, and a Criminal Action *ex lege Julia*; and a Penal Remedy *ex decreto Divi Marci*, That a Creditor by force, extorting what is truly due, *amittit Jus Crediti*: And our Reductions *ex capite metus* are but Civil Actions, as that *ex Edicto*: And the said other Remedies being penal, by the Municipal Law of the Romans, cannot be introduced by the Lords of Session being Civil Judges, without an Act of Parliament. 4. All Restitutions should Repone both Parties *in integrum*; and it were unjust, that if it were constant, and the Lords were convinced upon their own certain knowledge, that there had been an antecedent Minute, and that the same had been cancelled upon the granting of the said Disposition, that *Minto* should be restored, and not the said Sir John; that now *res non est integra*, being the antecedent Minute is not Extant; and tho it were Extant, it would be ineffectual, In respect *Minto* has Disposed the foresaid Lands to this Pursuer who is Infeft; and, having the first Infeftment would be preferable, whether the Minute were Extant or not. 5. As to the pretence that was so much urged, that it would be of dangerous consequence, that such Deeds extorted by force should be sustained upon the pretext of *non damnum*; and that it would tend to encourage such practices, the same is of no weight; being the Deed, being just upon the matter, may and ought to be sustained, and yet the way of procuring the same may be severely punished. 6. As to the difficulty of Probation, there being no Adminicles in Write, that there were such a Minute, It is not considerable; Seing *multa permittuntur causative*, which cannot be done directly; and that tho the Result of Probation by Witnesses, may be the making up or taking away of Writes, which cannot be done directly, but by Write; yet when that which is to be proven is in Fact, it may be proven by Witnesses; as in the same case, that the Disposition in question was Extorted, it may be proven by Witnesses, to take away the said Disposition: And if a person should be forced to grant a Disposition of Lands of 20. Chalders of Victual of Rent, and in Exchange should get a Disposition at the same time of other Lands of the half value, it were a good Defence and probable by Witnesses, that the Pursuer did get, the time of the granting the Disposition of Lands, worth 20 Chalders Victual, a Disposition of less value; and *Contingentia causa* and of a Transaction and circumstances of the same, ought not to be divided; but may and ought to be entirely proven by Witnesses, also well for the Defender as the Pursuer. Actor *Lockheart* and *Sinclair*. alteri *Cunningham* and *Mckenzie*. Mr. *John Hay* Clerk. *In praesentia*.

D. 420. Commissar of St. Andrews contra *Watson*.

11. January 1677.

THE Lords sustained a pursute at the instance of the Master of the Ground, against these who had bought, from his Tennent, his Corns and other Goods, wherein the Pursuer had a Tacite Hypothek. *Glenloch* Reporter. Mr. *John Hay* Clerk.

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D. 421.



D. 421. Viscount of Oxenford contra Mr. John Cockburn.  
*eod. die.*

**M**R. John Cockburne, having gone Abroad with the Viscount of Oxenford; and after his Return, having gotten several Bonds from the said Viscount of considerable Sums, and also a Pension of 1000 Merks: And having charged upon the same, the Viscount Suspended upon that Reason, that the said Mr. John, during their being Abroad, had received great Sums of Money remitted to him upon the Viscounts account, for which he had not Compted; and that, after Compt and Reckoning, he will be found Debitor to the Viscount in more than the Sums charged for: And it being Alledged by the said Mr. John, that he is only comptable for his Intromission, and that his Actual Intromission ought to be Instructed by Write or by his Oath; and the Declarations, of Merchants and Factors Abroad, cannot be Probation to bind upon him so great Intromissions.

The Lords considered the condition of the Viscount for the time, that he could not Intromet himself; and that the said Mr. John had such Influence upon him, that having been his Governour at Schools, and upon the desire of his Friends being put from him by an Act of Council, He, notwithstanding, without and contrare to the Advice of his Friends, carryed him Abroad; and since his return had gotten from him the Bonds foresaid: And therefore thought fit to try the Business to the bottom; And to ordain the said Mr. John to give in his Compts of what was received and debursed, when the Viscount was Abroad; and the Factors and other Witnesses to be Examined, concerning his Intromission; and whether or not any Moneys, that were remitted for the Viscounts use, were received by the Viscount himself, or by the said Mr. John. *Redford Reporter.* Mr. John Hay Clerk.

D. 422. Laird of Bawilay contra Barbara Dalmahoy.  
*eod. die.*

**A** Horning, against a Person dwelling within the Shire of Edinburgh, upon Lands Annexed to the Barony of Renfrew, being denounced at Edinburgh, was sustained; In respect that the said Lands were Locally within the Shyre of Edinburgh: And the Rebel, In respect of his Residence there, was Lyable to the Jurisdiction of the Sheriff, and to all Burdens, and had all Capacities competent to the Shire of Edinburgh, Mr. John Hay Clerk.

D. 423. Baillie contra Somervell. *eod. die.*

**T**HERE being a Provision in a Contract of Marriage in these Terms, that 5000 Merks of the Tocher should return to the Father in Law, in case his Daughter should decease before her Husband, within the space of 6 Years after the Marriage, there being no Children betwixt them then on life; and in case the Father in Law should have Heirs Male within the space of six Years after the Marriage.

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The Lords Found The said Provision copulative ; and that the Tocher should not return, albeit the Father in Law had Heirs Male within the foresaid time ; Seing the other Member of the said condition did not exist ; In respect, albeit his Daughter deceased within the said time, yet she had a Child of the Marriage that survived. *Gofford Reporter.* Mr. *John Hay Clerk.*

D. 424. *Jaffray contra Laird of Wamfray.* 12. Jan. 1677.

A Sum, due be a Bond bearing an Obligement to Infeft and Requisition ; was Found to be Moveable after Requisition ; and to fall under Escheat, notwithstanding the late Act of Parliament Ordaining Bonds bearing Annualrent to be Heretable ; but remains still Heretable *quoad fiscum* ; In respect Bonds of the nature foresaid became Moveable by Requisition, even before the said Act of Parliament ; And the Fisk, since by the foresaid Act of Parliament, is not put in better case, is not in worse. *Glendoich Reporter.* Mr. *John Hay Clerk.*

D. 425. *Inter eod. die.*

IN the same case It was Found, That an Instrument of Requisition was Null, because it did not bear, that the Procuratory was produced : And an Instrument being produced extended under the Notars Hand, and being quarrelled upon the Ground foresaid, The Lords did not allow the Notar to give out an other Instrument, bearing the Procuratory to be produced ; nor did admit probation by Witneses, that the Procuratory was produced ; Seing such Solemnities are not presumed, and cannot be proven by Witneses, but by valide and formal Instruments : And a Notar having given out an Instrument, that is defective, cannot thereafter give an other to supply the defect ; Otherways the question being betwixt the Creditors, who had done lawful Diligence and a Donator, it should be in the power of a Notar to prefer and gratify either party, as he should be prevailed with, either to give out, or not to give another Instrument.

D. 426. *Inglis contra Lawrie.* eod. die.

SOME of the Lords were of the Opinion, that a Husband may give validly, during Marriage, to his Wife, a Provision or Jointure, where there is no Contract of Marriage : But that the Wife could not give to the Husband, tho there were not a Contract of Marriage, and that she might revock any such Donation : which appears to be hard and unequal. Actor *Colt*, alteri *Dalrymple.* Mr. *Thomas Hay Clerk.* But this Point was not decided.

D. 427. *Fordel contra Caribber.* 16. January 1677.

IN a Reduction, at the instance of the Laird of Fordel, against Monteeth of Caribber, of a Disposition granted by Monteeth of Randsfurd to Caribber ; upon that Reason, That the said Disposition was not delivered, but was lying by the Defunct in his Charter Chest, and blank in the Name and Date ; and that the Defender intrometted with the same unwarrantably, and filled up his Name. *The*

*The Lords Ordained* certain Persons, who were going to *France*, to be examined before Debate; reserving to themselves to consider what their Depositions should work.

Tho it may appear hard, that a Write should be taken away by Witnesses; yet the Reason being relevant, and in Fact, and resolving in dole and Fraud, it may be proven by Witnesses. Mr. *John Hay Clerk*.

D. 428. *Stewart of Ardvorlich contra Riddoch.*  
*eod. die.*

**D**AVID Riddoch, by Contract of Marriage betwixt his Son *Alexander* and *Jonet Ballentyne*, did dispone to the said *Alexander* his Estate: and thereafter did dispone the same to his second Son *David Riddoch*, for payment and with the burden of all his Debts: who did thereafter dispone the same to *Stewart of Ardvorlich* for a just price.

The said *Stewart of Ardvorlich* pursued a Reduction of the Disposition, contained in the said *Alexander* his Contract of Marriage; upon that Reason, That the said Contract of Marriage was not delivered to the said *Alexander*, at the least there being but only one double subscribed, the same was given back to *David Riddoch* the Father; and was lying by him the time of his decease: And it was evident, that it was never intended, that any other use should be made of the said Contract, but only in order to get a Marriage to the said *Alexander*, as being provided to the said Estate; in swa far as the said Disposition, in favours of the said *Alexander*, was without the burden of the Disponers Debts, which were very great; and did not so much as reserve his Liferent: Whereunto *It was Answered*, That the Contract was a mutual Evident, subscribed by both Parties, and that Marriage had followed upon the same; and therefore it could not be taken away, upon the pretence of not delivery.

*The Lords Found*, That tho the Contract had been beside the Father the time of his decease, it was not to be considered as *instrumentum penes debitorem*, being a mutual Evident: But thereafter *It was Replied*, That the Pursuer offered to prove, that not only the said Contract was lying by the Disponer, the time of his decease, but an Assignation blank of the said Contract; which, being in the Disponers Hands, was in effect a retrocession or Discharge of the Disposition, contained in the Contract: Which Reply the Lords found Relevant. *In presentia*.

This Reply was Found also probable prout de jure.

D. 429. *Cunningham contra Halyburton.* *eod. die.*

**T**HE Lords Found, That a Tackfman of Lands, within Burgh, may be removed, if he be behind in payment of his Duty; unless he find Caution as to the future; in the same manner as Tackfmen of Land in the Countrey. *Forret Reporter. Gibson Clerk.*

D. 430. *contra* *eod. die.*

**T**HE Lords Found, That a Burgefs of the Town, tho he be not *Incola*, if he trade, may be stented for payment of his Majesties Taxation.

D, 431:



D. 431. Earl of Glencairn contra *Brisbaine*. eod. die.

**T**HE Lords Found, In the Case abovementioned *Glencairn* contra *Brisbaine*, That the true Value of the Lands should be proven, to the effect it may be known whether the Price be adequate or not: And albeit the Lands had not been laboured by Tennents, being still in the Heretors hands, the Value might and ought to be proven, by the sowing and increase, and the quantity of the Land; and what Lands in that part, of the like quantity and quality, may be set for: And it was not enough, that now the Earl of *Glencairn* offered 2000 merks more, in respect the Lands might have been improven; or the said offer might be made upon Picque or Emulation. *Hatton* Reporter. Mr. *Thomas Hay* Clerk.

In this Case the Lords allowed a conjunct Probation:

D. 432. *Caribber* contra *Fordel*. 17. January 1677.

**T**HIS Day again in the Case abovementioned *Caribber* contra *Fordel*, The Lords did Find, upon a Bill given in by *Caribber*, That albeit Write cannot be taken away but by Write directly; and that a Disposition could not be taken away but by a Renunciation or some other Writt, where there is no question as to the Validity and Formality of the same; Yet it may be taken away by a Reduction *Ex capite Metus & Doli*, and *minoris atatis* and Lefion: And that in such pursutes, the Reasons being in Fact, and Lybelled either upon Force or Circumvention and Fraud, are probable by witnesses; and that the Reduction at *Fordels* instance upon that Reason, viz. That the Disposition in question was found among the Defuncts papers, the time of his Decease, and was intromitted with and filled up by *Caribber*, is *ex eodem capite Doli*. Mr. *John Hay* Clerk.

D. 433. contra eod. die.

**A**N Edict of Executrie, being Advocate from the Commissars; a Bill was given in, desiring that the Advocation might be summarily discusst, being both nearest of Kin, Creditors, and the Fisk were concerned, that the Testament should be confirmed and execute; which Desire, the Lords thought could not be granted, in respect of the Act of Regulation: but it was thought a great Escape and Inadvertency, that such Advocations should be past, being the Lords could not confirm Testaments: and if any Partie should be prejudged by any Act of the Commissars, it may be reduced, upon the head of Iniquity: And the Lords thought, it was fit that a new Edict should be raised; and if an Advocation should be sought, the Reason should be discusst upon the Bill.

D. 434. Earl *Argyle* contra *Mcnaughtoun*. 23. Jan. 1677.

**I**N the Case abovementioned, Earl of *Argyle* contra *Mcnaughtoun*, It was Found, That *Mcnaughtoun* having acquainted the deceast Marquess of *Argyle*, that he was to Marry with his Lady; and that the Marquess having returned an Answer by his Letter of the Tenor abovementioned

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tioned; the said Letter imported his Consent to the Marriage; and that the Marquess having consented, he could not claim the Benefite of the Marriage. *Vide supra* 3. January 1677.

D. 435. *Tailfer contra Sandilands. eod. die.*

**A** Curator having in his Accompts given in an Article of Incident Charges upon occasion of the Minors Affairs, *viz.* That he had met with Agents and others in Taverns, in Relation to the Pupills Affairs; and had been at Charges in drinking with them, extending to a considerable Sum, during the whole time of his Charge: The Lords did not allow the same in the Terms foresaid; But Ordained him to condescend upon the particulars: And if he kept a Book and Diary of his Debursements, so that he might warrantably declare, that he had truly debursed the particulars thereinmentioned; they enclined to modify the same to such a Sum, as they should find reasonable.

D. 436. *Home of Ford contra Steuart. 24. January 1677.*

**A** Wadset being granted in these Terms, That the Wadsetter should possess the Lands; and that the Granter should free the Wadsetter of Levies of Horse, and Feu-duties, and Ministers Stipends: It was Found that the Wadsetter is not Lyable to Compr and Reckon for the Duties and superplus of the same, exceeding the Annualrent; In respect, the Wadset was a proper Wadset; and the Wadsetter was not free of all Hazards of the Fruits, Tennents, War and Vastation. *Redford Reporter.* Mr. Thomas Hay Clerk.

D. 437. *Ronald Grahame contra Sarah Rome. eod. die.*

**J**ohn Rome being obliged by his Contract of Marriage with his second Wife to provide 10000 Merks in favours of himself, and his Spouse in Conjunct-fee, and the Heirs of the Marriage; whilks Failzieing to his own Heirs and Assignes: And to provide also 5000 Merks in favours of the Remanent Bairns of the said Marriage:

The Lords Found, That the Father was Fiar of the said Sums; and that the Heir of the Marriage and Remanent Bairns had an Interest only to succeed to him as Heirs of Provision in the same: And that the Creditors might affect the said Sums; and would be preferable to the Bairns; Notwithstanding their Debts were Contracted after the said Contract of Marriage, and Inhibition thereupon; seing the Inhibition could not take away his Fee: And the Import and Effect both of the said Obligements and Inhibition is only, that the Father should do no fraudulent Deed, without an Onerous Cause, in prejudice of the same. *Gofford Reporter.*

D. 438. *Ardblair contra Wilson. eod. die.*

**A** Bond being granted by James Bisset of Neitherbalcarne to the Laird of Ardblair for Love and Favour; to be payed after his decease: The Lords Found, That the said Bond, being granted without an Onerous Cause, to be payed in manner foresaid after the Granters decease; could not

not prejudice posterior Creditors, who were *in bona fide* to lend their Money, notwithstanding any such Latent Deeds and Bonds.

This Decision seems to be hard; Seing it was lawful both to the Granter and Receiver of the said Bond, to grant and receive the same: And the said Donation, being lawful *ab initio*, could not become thereafter unlawful by any Deed of the Granter: And Fraud cannot be pretended, but where Creditors or others, the time of the granting of such Bonds, were prejudged; unless it did appear by some speciality and circumstance in the case, that there had been a design to Cheat and Circumveen these who were to lend their Money, by granting and settling upon the Relations of the Debitor, his Estate; and thereafter to get in his Hands, his Creditors Means, whom he was not able to satisfy; which was Found in the Case of *Maiffon* and *Pollock*, and was not Alledged in this Case. *Nervey* Reporter. Mr. *John Hay* Clerk.

D. 439. *Sinclair contra Home of Renton. eod. die.*

**A** Bond of Corroboration being granted for a Sum due upon a Wadset; with power to use Execution without Requisition: The *Lords Found*, That the Creditor may summarly compryse upon the same without previous Requisition. *Glendoich* Reporter. Mr. *John Hay* Clerk.

D. 440. *Nairn contra Stuart of Innernytie. eod. die.*

**A** Presentation being granted by a Bishop to a Prebendary in favours of a person dureing his Lifetime; and after his decease to his Son: The *Lords Found*, in a multiple poinding and competition, betwixt the persons substitute in the said Presentation; and another Prebendar provided by the succeeding Bishop, by the decease of the first Prebendar; That the Substitution, contained in the Presentation foresaid, did expire by the decease of the Father, and that the Substitution was void; In respect, the Bishop could not, in prejudice of his Successor, grant a Presentation in the Terms foresaid, bearing a Tailzie and Substitution. *Castlehill* Reporter. Mr. *John Hay* Clerk.

D. 441. *Drumellier contra E. Tweeddale. eod. die.*

**I**T being objected against Major *Bunting*, being led as a Witness for *Drumellier* against the Earl of *Tweeddale*; That he had given Partial Counsel, at least had concerned himself as a Party for *Drumellier*; In swa far as, he had been at Consultations with him, in Relation to the Process.

The *Lords Found*, That he could not be a Witness, tho he was a person of Integrity above exception; and that he was free to declare that, at the said Consultations, the point, whereupon he was to be used as a Witness, was not in consideration. *Gibson* Clerk.

D. 442. *Grange Dick contra Oliphant. eod. die.*

**A**N Assignment being granted for relief, and payment of certain Sums mentioned in the Assignment; for which the Assigney was Cautioner for the Cedent; the same was questioned upon that head, that it was never delivered,



delivered, but was still in the Cedents Hands: The Lords Found, That the said Assignment was never delivered: And yet they Found, That it was an effectual Evident in favours of the Assigney, In respect the Cedent had made the same publick by a Horning thereupon. Sir George Lockheart &c. alteri Cuninghame &c. *In presentia.*

D. 443. Ker contra Kers. 25 January. 1677.

A Disposition being questioned, as being made *in lecto*, at least delivered then: It appeared by the Deposition of one [of the Witnesses, used for proving the Lybel, that the said Write was subscribed diverse Years before the Disposer was on death-bed; and that the same was delivered before death-bed to the said Witness: and that the Defunct having called for it on death-bed; for drawing two other Dispositions, of the Lands contained therein; one in favours of the Pursuer the Disponers Heir; and the other in favours of a Son of the Disposer, who was Father to the Person in whose favours the Disposition in question was made: And upon debate amongst the Lords, what should be the import of the said Testimony, seing the Depositar did not declare in what Terms the same was given to him by the Disposer; whether to the behoof of the said Person, in whose favours it was made or not; or upon any other account, for keeping the same, so that the Disposer might call for and alter it: *It was Found*, 1. That the Disposer might have revoked the same; In respect it did not appear, that it was delivered to the behoof of the Person to whom it was made.

This Decision seems to be hard; in respect the Disposition was now in the Hands of the Receiver, so that it was to be presumed, that it was delivered, either to him, or to the said other Person to his behoof: and the delivery ought to be construed, and presumed to have been, *ut operetur*: and the nature of the Act it self, imports, that it should be to the behoof foresaid: It not being to be imagined, that if the Disposer had intended to have retained the Power in his Hands, either to make the said Right effectual, or not; he would have given it out off his Hands.

2. *The Lords Found*, Upon the Testimony foresaid, That the Disposer having revoked the said Disposition not simply, but to the effect foresaid, that the said two Dispositions should be granted; The Pursuer therefore had not Right to the whole Lands, contained in the said first Disposition; but that the same should divide, conform to the said two Dispositions. Mr. Thomas Hay Clerk. *In presentia.*

D. 444. Procurator-Fiscal of Glasgow contra Cowan.  
26 January 1677.

THE Commissar of Glasgow, having sustained Process, at the Instance of the Procurator-Fiscal, for the tryal of a falsehood of Executions, whereupon a Decreet had proceeded: and having upon Probation of the falsehood, decerned the user of the said Executions, to pay 300. *lib.* to the Procurator-Fiscal as a Fine: and the said Decreet being suspended; *The Lords Found*, That the Commissar was not competent Judge to the improbation of Executions, by way of Action; seing they cannot reduce their own Decreets; and Improbation is a Reduction *ex capite falsi*. Justice-Clerk Reporter. Mr. Thomas Hay Clerk.

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It is to be considered, that the most part of Decrets, befor Inferior Judges, are for Null-Defence, and upon false Executions: and it were hard, that there should be no Remedy but by Improbations before the Lords, which may depend long and are very chargeable; So that Decrets before Inferior Judges being for the most part for inconsiderable Sums, the Remedy should be worse than the Mischief.

It appears indeed, that the Commissars have not power to Fyne; that being a Criminal Jurisdiction; and that they are not Judges to Improbation by the indirect manner; The Tryal of Falsehood, by circumstances and presumptions, being *Altioris Indaginis*; and of that Difficulty, that it ought not to be left to an Inferiour Judge. *Item*, The Tryal of Falsehood, as to that effect that Falsaries may be punished, ought not to be by any Inferior Judge; But it seems to be just and necessary, that Parties, grieved by such Decrets, should be allowed to pursue the obtainers of the same, to hear and see them reponed against the said Decrets, upon that Ground that they were not cited to the same; to be proven by the Witnesses and Executer himself, declaring that they pursue to that effect allanerly: And it appears not to be inconsistent with Law and Form, that this course should be taken; seeing the Judge does not reduce his own Decree, *ex capite iniquitatis*; and it may be provided, that such Pursutes, tho they be upon the matter Improbations, are only to the effect foresaid; and that no other effect or consequence shall follow upon the same; and *multa sunt per indirectum*, which cannot be directly: And if a Party, who is holden as confest, should raise a lybel before an Inferior Judge, that it may be Found that he was not *Contumax*, being out of the Countrey, or Sick, or detained by Storm, or some other insuperable Impediment; and that therefore he should be reponed; and the Decree should be holden as a Lybel; such a Pursute would not be incompetent, tho in effect it would be a Reduction upon the matter.

D. 445. *Donaldson contra Rinne.* 27 January 1677.

**I**T was moved, whether or not a Decree of an Inferior Judge, being questioned upon that Ground of Iniquity, that the Lybel was not proven; and the Depositions of the Witnesses being produced by the Pursuer *ab initio*; The Lord of the Outer House may advise the Probation; Or if it ought to be advised by the whole Lords? *It was Found*, That the Depositions being produced (as said is) the Lord may give his own Interloquitor, as upon any other Write produced *ab initio*, to instruct the Lybel. Tho some of the Lords were of Opinion, that the Probation ought to be considered and advised by the haill Lords; And it was hard, that the Probation being found sufficient, by a competent Judge, it should be in the power of one single Lord to review the same, and find the contrare. Mr. John Hay Clerk.

D. 446. *Murray Pupil contra* 31. January 1677.

**A** Pupil of 4. Years of Age, being pursued upon the Passive Title of a Charge to enter Heir; and the Friends conceiving that it were fit to

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Renounce;

Renounce: none of them being Curators, nor being willing to meddle, and to authorize the Pupil to renounce; *The Lords Decerned*, but superseded Personal Execution, until the Pupil should be past Pupillarity. *Castlehill Reporter*.

D. 447. Master of *Rae contra Sinclair of Dumbaith*.  
1. February 1677.

*Sinclair of Dumbaith, Sandside* and others having in a Hostile manner invaded the Lord *Rae's* Country: There was a Criminal pursute intended against them for the Crimes committed upon the occasion foresaid; but the said pursute being taken away by a Remission, there was thereafter a Spuilzie pursued at the instance of the Master of *Rae*, having Affignation from his Father; and by his Tennents whose Goods had been Robbed and taken: And it being Alledged against the said Pursute, that it was prescribed, *The Lords* sustained the Reply, that the Prescription was interrupted by the foresaid Process before the Justices: And again this Day a Summonds of Spuilzie, which had been formerly intended, being produced; and it being Alledged, that by the said Summonds and Execution upon the same, the Prescription was interrupted, *The Lords Found*, That the same did not interrupt; In regard it appeared, that the Names of the Defenders have been Blank in the saids Summonds, and since filled up with another Ink: And it appeared by the Executions, that the same were at the instance of *Gray of Arbo* and others mentioned in the Summonds, without specifying the said other Persons; and the Defenders had settled with, and satisfied *Arbo*; So that it appeared, that the Names of the said other persons had been filled up in the body of the Summonds, of purpose to be a Ground for the said Reply: But tho the Lords did not sustain the Process, as to the effect of giving the Pursuer *Juramentum in litem*; In regard the Goods Libelled, were Libelled to extend, as to the number of Goods, and the Damage sustained by the Pursuers Cedent, to vast Sums, exceeding the value of that whole Country; yet the Lords did adhere to their former Interloquitor, That they would consider, the time of the advising, the profits of the Goods as in a Spuilzie.

It occurred to some of the Lords and was moved, whether *Juramentum in litem*, being given to the Party wronged; and upon that account, that the quantities and the Kinds of Goods, taken from him, could not be so well known to others and proven; if the same be a personal favour; Or if it may be extended to an Assigney? *Newbyth Reporter*.

D. 448. *Holmes contra Marshall*. 2. February 1677.

**T**HE Lords Found, That a Woman, being provided by her Contract of Marriage, to a Liferent of the Conquest of Lands, or other Goods that should be acquired during the Marriage: And the question being of Moveables, and she having accepted a Third of the same, she could not return to crave a Liferent of the other two parts; tho it was Alledged by her, she had not accepted the same in satisfaction of what she could claim. 2. It was Found, That a Woman, being provided, as said is, to a Liferent of all the Moveables her Husband had the time he Married



ryed her; and which he should acquire during the Marriage; It was in her Option, either to take her to her Liferent of the whole; or to claim the 3<sup>d</sup> part in property; but, making Election, could not varie. Tho this was Found by plurality, yet some of the Lords were of Opinion, that by the Provision foresaid she has only a Liferent; and that she had not the said Election; Seing *eo ipso* that she is provided to a Liferent of all, it is intended and agreed, there should be no *Communio bonorum*; It being inconsistent, that she should be both Proprietar and Liferentar *usufructu formali*. *Newbyth Reporter. Gibson Clerk.*

D. 449.

contra *Tait. 6 February 1677.*

**T**HE Lords Found, That a Bond, being granted on Death-bed, with consent of his Appearand Heir for his Interest; bearing an obligation to pay a Sum of Money; Is to be considered, not as a Legacy, but as a Bond *inter vivos*: Seing, by the Common Law, all persons are in *legitima potestate* as to the granting of Bonds; And our custom, whereby persons on Death-bed are not in *in liege poustie*, is qualified with an exception, *viz.* unless the Heir consent; in whole favours the same is introduced. *Castlehill Reporter.*

D. 450.

contra

*ead. die.*

**T**HE Lords Found, That Appearand Heirs may be pursued, as being having before the year expire; seing *eo ipso* that *miscent, adeunt passive*: And as to that pretence, that they would be wronged if it should have appeared by the probation that they did not meddle; It is of no weight; Seing the Lords may modify Expences.

D. 451.

contra

*29. February. 1677.*

**A**N Exhibition being pursued at the instance of an Heir of Conquest: And it being Alledged by the Heir of Line, that some of the Lands, whereof the Writes were craved to be exhibited, were in *Holland*; and that by the custom there, the Eldest Brother did not succeed as Heir of Conquest; but all the Brothers and Sisters equally; so that the Writes ought not to be delivered to the Pursuer, who had only an Interest as to the fifth part; whereas the Defender had four parts, having acquired three from his Brothers and Sisters, and having one himself; and he having the far greater interest in the Land and Writes, ought to have the keeping of the same, being Lyable to make them forthcoming to the Pursuer.

The Lords notwithstanding preferred the Elder Brother to the keeping of the Writes.

In that same Cause, *It was Alledged*, That, as to the Lands in *Scotland*, the Defuncts Right was only by a Comprising, which was personal, and whereupon no Infeftment had followed; and which belonged to the Heir of Line, as Tacks and Reversions: The Lords, nevertheless, Found, that the Heir of Conquest has Right to the same, conform to a late Decision.

D. 452.

D. 452. *Purveyance contra Knight.* 8 June 1677.

**T**HE Lords Found, Upon the advising of a concluded Cause, after Debate *in prasentia*, in the Case in question, That *Liber Rationum*, and a Compt-Book of a Merchant, containing an Article of Debt, due by him to the Pursuer, was a sufficient Probation; In respect the said Compt-Book was written with the Merchants own Hand; and he was known to be a person of great Honesty and Exactness: and the Article was so clear, that the time therein mentioned, he stated himself to be Debitor in the said Sum, all bygone Annualrents being payed; and in an other part and Article of the said Book, he did acknowledge, that he had borrowed the said Sum, and was special as to the time; and there was a great Confidence and near Relation betwixt him and the Creditor; and therefore the Lords decided as said is; in respect of the said Circumstances: but thought it hard, that Compt-Books in *Scotland*, where there is not that exactness that is else where, in keeping Books, should have that Faith that is given to them elsewhere. Mr. Robert Stewart Actor, alteri Cuningham. Mr. John Hay Clerk. *In prasentia*.

D. 453. *Campbel contra Taite.* eod. die.

**T**HE Lybel being referred to the Defenders Oath; and he having declared upon a general Interrogator, that he was not owing the Sum acclaimed; *It was urged*, the time of the advising of the Oath, that the Defender should declare, whether or not he had gotten a parcel of Lint, and what way he had payed the price of the same. *The Lords Found*, That he should not be urged to declare upon that Interrogator; In respect it was not desired he should be interrogate upon the same when he did declare; and having denyed that he was any ways Debitor, he would be involved in Perjury, if upon a special Interrogator he should acknowledge that he was Debtor upon the account therein mentioned. Mr. Thomas Hay Clerk. Stewart and Swinton Advocats.

D. 454. *Patrick contra Anderson.* eod. die.

**A**N Executor, having alledged that the Testament was Exhausted, and for probation, having produced the Defuncts Bond, with a Discharge from the Creditor after the Defuncts decease: and it being Found, That the same did not prove, unless there had been a Sentence produced: *It was* thereafter *Alledged* for the Executor, that seing he instructed the Debt, and that he had payed the same *bona fide*, the same ought to be allowed for his liberation; at least that the said Debt should come in *pari passu* with the Pursuers; unless they could object against the same, as not a true Debt; which was Repelled; in respect no Legal Diligence had been done for the said Debt.

Some of the Lords were of Opinion, that it should have been allowed to come in *pari passu*; In respect the Diligence, used by the Pursuer, in intending a Pursute against the Executor, was only Personal, and did not affect the Goods; and the Executry being short, and the Goods being to be forthcoming to all Parties having Interest, any Creditor may compare  
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for his interest, and crave to have a proportion of the same at any time before Sentence; Otherways a great Creditor, in as much as may be equivalent to the Executrie, if he should pursue the Executor before the other Creditors, they may be all frustrate. Mr. *Thomas Hay* Clerk.

D. 455. *Blackwood contra Pinkill.* 9. June 1677.

A Father having infest his Grand-child in Fee of his Estate, and his Son Father to the Fiar, in Liferent; with a Provision, that the Liferent should be alimentary to him: *The Lords*, Upon a Debate among themselves, concerning the said Qualification of the Liferent, were of the Opinion, that the Son being provided before to some other Lands simplie, without the said Quality, the Creditors of the Son might, by their Diligence, affect the said alimentary Liferent; except so much of the same as the Lords should think fit to reserve for a competent Aliment to the Son; but there was not a Decision in the Case. Mr. *John Hay* Clerk. *Concluded Cause.*

D. 456. *Captain Binnie contra Gibson.* 20 June 1677.

THE Lords Found, That a Partie, being pursued as representing his predecessor; for payment of the Sum due by a Bond; might propone a Defence of Payment; notwithstanding that he had, before, pursued an Improbation of the said Bond: In respect the Bond being ancient and not granted by himself, he was *in bona fide* to pursue Improbation of the same; and thereafter it appearing to be a true Bond, he may also alledge payment; giving his Oath of Calumny upon the Defence.

D. 457. *Pringle contra Pringle of Torsonce.*  
21. June 1677.

THE Laird of *Torsonce* having disposed his Estate to his Eldest Son for Love and Favour; with a Provision contained in the Disposition, that it should be lawful to him to burden the saids Lands by Wadsets of the same; Or Annualrents forth thereof, for the Sum of 5000 *Merks* Redeemable by his Son: And having thereafter granted a Bond to a Daughter of a second Marriage, of 1000. *merks*, who did pursue the Representatives of the Son, for the said Sum, *It was Alledged* for the Defender, That he could not be pursued Personally; but if there were any Ground of an Action, it would be only for a Declarator, that the Lands are lyable to the said Debt. 2. That there could be no Ground of Declarator, in respect the Disposer had not made use of the said Faculty, nor granted a Wadset for the said Sum; and that the Defunct had a personal Estate and Executry; And in swa far as, he had not, conform to the said faculty, secured the Pursuer out of the said Lands, he had declared his Intention, not to make use of the said faculty.

*The Lords Found*, That the Pursuer ought to discuss the Executry, and any other Estate belonging to the Disposer: and if the said Sum could not

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be recovered out of the personal Estate, that he might have recourse against the said Lands ; which was *Found* by the Lords, upon these considerations, *viz.* That the Right made by the Father being for Love and Favour, the said Reservation ought to be interpreted *benigne*, and it was to be considered *quid actum* ; the Fathers intention being to have a Power, to contract also much Debt as might amount to the said Sum ; And *eo ipso* that he did grant the said Bond, he did burden the said Lands virtually ; and in his own time they might have been comprised for the said Sum ; and therefore may be now affected and comprised.

2. The Fathers End being to have power to burden with the said Sum, the *modus* and way was insert *ex stylo* by the writer ; that which is mentioned in the Disposition being the most ordinary, and therefore to be understood *demonstrative* but not *taxative*. 3. Tho some of the Lords were of Opinion, That the Pursuer may immediatly, as other Creditors, have recourse against the Estate ; yet it seemed to be reasonable, that, in this case, the Reservation being in the Terms foresaid ; and the Bond, whereupon the Security was founded, not relating to the same, the Executry should be first discuss : Seeing by the Common Law the Executry was ever first lyable ; And tho, by the Lords Practice, Creditors may pursue either the Heir or Executor, yet there being such a speciality in this case, and the Defender not representing personally the Grandfather, as Heir, or otherways by Progreis, his Representatives ought to be first discuss, and the said Lands to be lyable only *in subsidium*. Actores Sir George Mckenzie, Mr. Robert Stewart. Alteri Lockheart and Pringle. Gibson Clerk. *In presentia*.

D. 458. *Malloch contra The Relict of David Boid.*

26. June 1677.

A Second Compriser having pursued a Declarator, that the prior Comprising was satisfied by Intromission ; and the Defender having in the Compt and Reckoning given in an Article of Deburfements for prosecuting and defending of Processes concerning his Right ; The Lords *Found*, That, as to the extinguishing of the Comprising upon the account of Intromission, the Expences in deduceing the Comprising and obtaining Infeftment were only to be allowed ; but not any other extrin-sick Deburfements : But the Comprising being extinct and satisfied, if there were any superplus of Mails and Duties, for which the Compriser was to be comptable, he might retain, of the first end of the same, such as were profitably expended, nor only in Relation to his own, but the Pursuers Right. *Newbyth Reporter*.

D. 459.

contra

*eod. die.*

THE Defender, in a Spulzie, having Alledged that the Goods were his own ; and that, having given them to the Pursuer to be grassed, he might have taken away his own Goods : It was *Replied*, That the Pursuer was not obliged to debate the Right and property of the said Goods ; but *in spolio*, he needed Lybel no more, but that the Goods were upon his Ground and in his Possession ; and taken away *vi* and in manner Lybel-ed : And *spoliatus ante omnia restituendus*.

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The Lords debated among themselves, whether the Defence be Relevant; and did not decide the case: Some being of Opinion, that if it should evidently appear, that the Pursuer was not in Possession of the Goods as *suos*, but in behalf of the Defender; as if there were a Writt betwixt the Pursuer and Defender, bearing that the Goods were the Defenders; and that the Pursuer *contractu Locationis & Conductionis* had taken the same in graeing; that the Defender could not be Lyable for Spuilzie of his own Goods: But if it should appear, that there was any violence in taking them away, he may be pursued for a Riot.

D. 460. *Drumkilbo contra Mcmath and Oliphant. eod. die.*

**J**anet Mcmath Lady Grange being Creditrix to the Laird of Kilspindie; And having, upon an Arrestment in the hands of Drumkilbo, obtained a Decreet to make forthcoming; There was thereafter a Suspension of double poinding against the said Janet Mcmath, and Sir Laurence Oliphant of Gask, who pretended Right to the Sum due by Drumkilbo, by an Assignment intimate before the Arrestment: And in the Competition foresaid, the said Sir Laurence was preferred. But thereafter in an Improbation of the said Assignment, at the instance of the said Janet Mcmath, the said Sir Laurence having abiden by the same, It was Found, after a long and litigious dependence by the space of 50 Years, that the Assignment was false: And William Dick of Grange, the said Janet her Son, having thereafter intended a pursue against the said Sir Laurence, to hear and see it declared, that in respect the said Sir Laurence, by his compareance, and making use of the said false Assignment, had been preferred; and had rendered the foresaid Diligence by Arrestment ineffectual; and had transacted and made benefite of the said false Assignment; That therefore, In so far as he was *Lucratus* he should make the same forthcoming for payment of the Pursuers just Debt; Especially it being considered, that he had Discharged one of the Cautioners in Drumkilbo his Bond: It was Answered, That he was *in bona fide* to acquire a Right to the said Assignment, neither knowing, nor being accessory to the Forging of the same; and he had made no benefite by uplifting from Drumkilbo any part of the said Debt; but by transferring his Right in favours of Mr. John Blair, which he had done *bona fide*: And as to the Discharging the Cautioner, it could not prejudice the Pursuer, seeing the Discharge would fall in consequence of the Assignment.

The Lords Found, That, albeit he were not accessory to the Forgery, yet having used a false Write, and having litigiously so long maintained the same; and upon that occasion, the Pursuer being altogether frustrate; he ought to be Lyable *in quantum lucratus*, and what he had gotten more by the Transaction with Mr. George Blair then he had given for acquiring the said Right: And the Lords reserved Action to the Pursuer against the Cautioner: And in case the Cautioner should be Assolizied, without prejudice to have recourse against the said Sir Laurence as Accords. Actores Lockheart, Monypenny &c. alteri Cuninghame &c. Mr. Thomas Hay Clerk. *In presentia.*

D. 461.

D. 461.

contra The Laird of  
*Cramond. eod. die.*

**M**R. *Cornelius Inglis* being Debitor to Mr. *John Inglis* of *Cramond* in the Sum of 3500. *Merks*; He did give to *Cramond*, for Security of the said Sum, and for relief of Cautionries for him, extending to towards 10000 *M.* a Bond for payment and relieving him of the said Sums; with an obligation to Infeft in the Lands thereinmentioned, for his Security and relief of the said Sums; and a precept of *Safine* whereupon Infeftment followed: And thereafter, Mr. *Patrick Inglis*, the said Mr. *Cornelius* his Eldest Son, did grant a Bond to *Cramond*, relateing expressely to the said former Bond and Right of Relief, and in Corroboration thereof, and the Infeftment thereupon, containing an Obligation for Payment and releif of the said Sums.

Thereafter the said Mr. *Patrick* did obtain, from his Father, a Right and Infeftment of the said Lands, upon that narrative, that he had undertaken the payment of his Fathers Debts; and that he was engaged for him; and that the said Right was granted to him for his Relief; whereupon he obtained Possession; and, before any Diligence, at the instance of any of the other Creditors, he did pay some Annualrent to *Cramond* upon a Discharge, relateing to *Cramonds* Right and Infeftment foresaid.

Thereafter there being a Multiple poinding raised against *Cramond*, and some of the Creditors, who had deduced a Compyring against the said Mr. *Patrick* of his Right; the Creditors *Alledged*, that they ought to be preferred, because *Cramonds* Right was only base, and the said Mr. *Patrick's* Right was cled with Possession, before any pretence of Possession in the person of *Cramond*; and that they having Compyrsed Mr. *Patrick's* Right are thereupon preferable to *Cramond*; Whereunto it was *Answered*, That *Cramonds* Right, being a Right of Relief, could not take Possession *ex natura* of the Right, until a distrefs; and because it was provided by the Right it self, that *Cramond* should enter to the Possession in case of distrefs; and in case he should not be payed of his Annualrent; which he could not do before Declarator: And that the *Lords* had diverse times *Found*, that Infeftments of Warrandice, whereupon there could be no Possession before Eviction, should be preferred to posterior Infeftments; and that Infeftments of Annualrent, being anterior, should be sustained in a Comperition with posterior base Infeftments cled with Possession; Because the first Term of Payment of the Annualrent was not come, when the posterior Infeftment came to have Possession; and that the Comperition was not betwixt *Cramonds* and the Compyrsers Infeftment upon the Compyring, but Mr. *Patrick's* own Infeftment; and that *Cramonds* Infeftment was cled with Possession before the Compyrsers Right and Interest, by payment of the Annualrent of the said Sum due to *Cramond* himself; as appeared by the Discharge accepted by Mr. *Patrick* relating to *Cramond* his Right and Infeftment foresaid: And that base Infeftments by the Common Law being valide; And by the Act of Parliament *K. Ja. 5th. in anno 1540.* It being provided, that for obviating Fraud by granting  
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private and latent Infeftments, in prejudice of posterior Infeftments that are publick, being either holden of the Superior or by Possession; the said Act of Parliament cannot be extended to this Case; In Respect *Cramonds* Right cannot be said to have been fraudulent and private as to Mr. *Patrick*; In respect he did not only know the same, but did ratify and corroborate the said Right as said is, both before his own Right and after the same; and before the interest of Creditors, he did in effect ratify and homologate the same, by making payment conform thereto, as said is.

The Lords, In Respect the case was of moment, as to the Preparative, Ordained that it should be Debated amongst themselves: And upon the Debate, they decided these points. 1. That, the said Act of Parliament *K. Ja. 5th.* being general, and there being no Exceptions of Infeftments of Relief, the said Act is comprehensive of the same. 2. Tho the Act of Parliament, anent Registration of Seafings, does secure Singular Successors, yet the said Act of Parliament *K. Ja. 5th.* is not taken away, tho in in some cases, the Lords are apt to favour prior Infeftments, where there is no presumption of Fraud: And therefore, when there is any pretence of Possession, as in the case of Infeftments of Warrandice, they Found that *fictione Juris* the Possession of the principal Lands is the possession of the Warrandice. 3. That albeit Mr. *Patrick* could not question *Cramonds* Right for the Reason foresaid, yet the Comproysers, being Singular Successors, may question the same.

The Lords therefore preferred the Creditors: And yet sustained *Cramonds* Infeftment, In swa far as concerns the Sum foresaid due to himself, and not as to Cautionries; In respect the said Discharge was only of the Annualrent of the Sum due to himself.

This Decision appears to be hard, upon these Considerations: First, Because *Cramonds* Infeftment, tho base, as to the point of Right, by the Common Law is preferable: And as to the said Statute, it introduces only a *presumptio Juris*, that base Infeftments, not cled with Possession, are presumptively fraudulent: And the Question, whether *Cramonds* Infeftment was fraudulent, was to be considered in relation to Mr. *Patrick* and his Infeftment, and not to his Successors: And the said presumption was taken away by Mr. *Patrick* his Deed foresaid, having corroborate, as said is, *Cramonds* Infeftment; which was verified by a Write Subscribed by Witnesses, and which was Found to militate, even against the Creditors, and to cloath *Cramonds* Infeftment with Possession. 2. *Cramonds* Right being *Jus individuum*, tho upon distinct Grounds, it could not be fraudulent and private *ex parte*, and *ex parte* publick. Actores Sir *John Cunningham*, &c. alteri *Lockheart*. In *praesentia*.

D. 462. Mr. *John Kincaid* contra *Gordon* of *Abergeldie*.  
eod. die.

MR. *John Kincaid* having pursued *Gordon* of *Abergeldie*, as representing his Father, by Behaving: His Defence was, That he had Right by an expired Comproysing, whereby his Father was denuded,  
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so that he could not be Heir to him: But in the same Process, in respect a Reduction and Declarator was intended at the said Mr. *Kincaid's* instance, within ten Years after the appearand Heir had purchased a Right to the said Comprising; The *Lords*, tho there were no Order used, did *simul & semel* sustain the said Processes: and appointed Compt and Reckoning, and Auditors.

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## ERRATA in the *Decisions*.

Page 4. line 15. read rats. p. 9. l. p. mult. Pursuer r. Person. p. 15. l. 29. Laird of r. Lord. p. 17. l. 17. after him add but. *ibid.* l. 26. after of add a. p. 33 l. 7. after Goods, add The Reason was found relevant. p. 35. l. 21. r. conclude. p. 37. l. 5. have r. give. p. 50 l. 9. after we add no. p. 51. l. 38. most r. more. p. 54. l. 9. after anterior add to the Son's Right. p. 58. l. 35. after Right add till. p. 65. l. 11. purchase r. possession p. 73. l. ult. yet r. so. p. 74. l. 37. after to add an. p. 75 l. 35. D. & r. Granter. p. 84. l. 23. after confirmable, add Quots of Testaments confirmed before the Act restoring Quots to the Bishops. p. 85. l. 18. due r. done. p. 89. l. 18. after by, add Writt or. p. 105. l. 11. Donator r. Executor. p. 108. l. 27. *feu-duties* r. Augmentations. p. 111. l. 43. after Creditor add confirmed before the Act of Sederunt. p. 173. l. antep. after flagrant add regulate non potuit.

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 WAIRD Lands being disposed by a Father



# W. I N D E X W.

Father, with obligation for two Infestments; The Son must compleat the said Right by Entreing and Infesting the Partie, Reserving to him Action for Relief of his Ward and Marriage as accords. d. 82.

WARRANTICE. fee. d. 15. d. 93.  
WARRANTICE from Affriction. d. 173.

The WARRANTICE of a Disposition of a Comprising, found *in dubio* to warrant the Validity of the Comprysing and the Reality of the Debt; but not to refund the pryce in case of Eviction. d. 44.

WARRANTICE of Lands is absolute, unless expressly limited: But Warrantice in Assignations of Bonds is only *debitorem esse*, but *non esse locupletem*. d. 248.

WEARING the Habite. d. 252.

WIFE. fee. d. 6. d. 10. d. 71. d. 85. d. 100. d. 105. d. 125. d. 141. d. 143. d. 144. d. 182. d. 204. d. 257. d. 264. d. 297. d. 315. d. 332. d. 353. d. 371.

A Wife consenting to a Disposition of Lands made by her Husband; is not hindred to evict the same, she acquireing there-after a Right from another Person. d. 128.

A Wife haveing a *peculium* settled upon her exclusive of her Husbands Intrest therein, found lyable for a Bond granted by her. d. 164.

The Wife is *præposita negotiis domesticis* for Provision of the House. d. 310.

A Wife Trafiqueing as a Merchand, the Husband is lyable for Debts Contracted by her on the account of that Trafique, *actione Institoria*. d. 319.

A WIFES obligation *stante matrimonio*, d. 84.

Wives and conjunct persons ought to abide by Writs *Simpliciter*. d. 265.

Wives Infestments upon their Contracts of Marriage sustained albeit Base, in respect of the Husbands possession. d. 161.

WITNESSES. d. 441. see d. 42. d. 109. d. 219. d. 236. d. 317. d. 383. d. 419. d. 427. d. 428. d. 432.

Witnesses before Answer. d. 171.

Witnesses depositions how received before Litiscontestation to ly *in Retentis*? d. 74.

Witnesses in a Bond not being designed, It's allowed to the person to designe them; one of the Witnesses being yet on lyfe. d. 12.

WRITERS name may be condescended upon after the Writer and Witnesses are Dead: And in what case and Terms? d. 343.

Writers to the Signet discharged to alter the *Solennes Inducia* in Bills and Summonds, except in such as are priviledged by the Law. d. 167.

## F I N I S,